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APPLICABILITY OF THE REFUSE ACT (33 U.S.C. 407) TO VESSEL SEWAGE DISCHARGES INTO U.S NAVIGABLE WATERS

The Chief Counsel was asked for an opinion on the inclusion of untreated or inadequately treated vessel sewage in the definition of "refuse" under 33 U.S.C. 407. For the reasons discussed below I conclude that untreated or inadequately treated vessel sewage falls within the definition of "refuse" under 33 U.S.C. 407.

Section 13 of the River and Harbors Act of 1899 (33 U.S.C. 407), commonly referred to as the "Refuse Act," prohibits any "... ship, barge or other floating craft of any kind..." from throwing, discharging, or depositing "... any refuse matter of any kind or description whatever into any navigable waters of the United States or a tributary thereof." The Supreme Court has consistently supported a broad interpretation of "refuse" under 33 U.S.C. 407. U.S. v. Republic Steel, 362 U.S. 482 (1960); U.S. v. Standard Oil, 384 U.S. 224 (1966); and U.S. v. Pa. Industrial Chemical Corp. (PICCO), 93 S.Ct 1804(1973)

There is an exception in the Refuse Act for refuse matter of any kind or description "... from streets and sewers and passing therefrom in a liquid state." The Supreme Court and other Federal courts have interpreted this exception clause very narrowly in contrast to the broad interpretation of "refuse". Republic, supra, PICCO, supra. From the context of the Supreme Court decisions and subsequent Federal court opinions, the so-called "streets and sewers" exception has been limited to municipal sewage to the exclusion of any industrial wastes or other sources of sewage. There are no known cases involving the Refuse Act and vessel sewage discharges into U.S. navigable waters. Following the Supreme Court's interpretation of "refuse" and the "streets and sewers" exception within 33 U.S.C. 407, sewage from sources other than municipal sewage treatment systems falls within the definition of "refuse". This would include all vessel sewage, whether treated or not.

The Refuse Act contains a provision that the Secretary of the Army, under certain conditions, may permit the deposit of any material mentioned in the Refuse Act into navigable waters. This permit program has been interpreted as permissive and not mandatory. PICCO, at page 1811. With the enactment of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), this permit authority was transferred to EPA under Section 402, FWPCA. The Supreme Court in PICCO held that nothing in the FWPCA or any predecessor water quality legislation operated to permit discharges that would otherwise be prohibited by 33 U.S.C. 407. PICCO, at page 1814. The court stated that (after the 1970 Water Quality Improvement Act) a permit could not be issued unless the discharge material met the applicable standards. PICCO, at page 1814.

Section 402, FWPCA permit program applies to "pollutants", which, according to Section 502(6), FWPCA include (among others) sewage and sewage sludge. The Sixth Circuit Court of Appeals in U.S. v. Hamel, 551 F.2d 107 (6th Cir., 1977) held that "pollutant" under Section 502(6) was expressly intended to be at least as broad as the coverage of the Refuse Act. Hamel at pages 110 and 111. Section 502(14), FWPCA defines "point sources" (subject to the Section 402 permit authority of EPA) to include "...any... vessel or other floating craft, from which pollutants may be discharged." However, Section 502(6), FWPCA expressly provides that the term "pollutant" does not mean "sewage from vessels within the meaning of Section 312 of this Act." The legislative history states that this language means "sewage from vessels as that term is defined and controlled through the provisions of Section 312." Hearings before the Subcommittee on Air and Water Pollution of the Committee on Public Works, United States Senate, Ninety-Second Congress, First Session (Water Pollution Control Legislation Refuse Act Permit Program, Part 9), at page 76 under the Section 502 discussion. The question becomes: does Section 312, FWPCA "define and control" all sewage from vessels or only sewage from vessels with installed toilets? I conclude that this language operates to exempt any vessel with an installed toilet, which has an approved marine sanitation device (MSD). It does not exempt vessels without MSD's which discharge sewage, from the Section 402 permit program. Despite the PICCO decision that the FWPCA does not affect the term "refuse" under 33 U.S.C. 407, and despite the savings clause in Section 511, FWPCA, the only way to interpret the Refuse Act consistently with Section 502(6) is to conclude that vessel sewage from an approved MSD is not "refuse" subject to the Refuse Act. To decide otherwise would subject vessel owners in compliance with current vessel sewage standards under the FWPCA to criminal prosecution under the 1899 provision. This result could not have been intended by Congress. Sewage discharges from an approved MSD in excess of the effluent standards in 40 CFR 140 would be considered as a violation of §312(h)(4) because the MSD would be "inoperable." That still leaves the question of what to do with vessel sewage discharges, other than those from an approved MSD.

As noted in paragraph 5, vessel sewage discharges, other than those from an approved MSD are subject to EPA's Section 402, FWPCA, permit authority. A vessel owner may choose to comply with Section 312, FWPCA or apply for a Section 402 permit to bring the sewage discharge into compliance with the FWPCA. If either action is taken, no Coast Guard action should be taken under the Refuse Act for any subsequent vessel sewage discharge in compliance with Section 312 or 402, FWPCA.

There are three enforcement alternatives for cases involving vessel sewage discharges into U.S. navigable waters:

(a) The FWPCA

(1) Section 312-civil penalty action by the Coast Guard under §312(j); or

(2) Section 402-sewage discharges from vessels, other than those from an approved MSD may be permitted by EPA under the NPDES program; violations of the permit conditions subject the violator to EPA enforcement under §309, FWPCA.

(b) * * *

(c) The Refuse Act

Enforcement requires referral to the Department of Justice (DOJ) for possible criminal action under 33 U.S.C. 407. Violation is a misdemeanor, punishable by a fine of $500 to $2,500, and/or imprisonment for 30 days to one year. This alternative, however, should only be used as a last resort, due to reluctance by U.S. Attorneys to pursue such actions except for flagrant cases.

G-LMI memo of 5 November 1980

VESSEL OWNERSHIP; CIVIL PENALTY PROCEDURES

In this case, the appellant argues that he was not the owner of the vessel when the alleged violations occurred. However, the appellant was never informed that the Hearing Officer relied upon evidence which was not in the record nor disclosed to appellant to the effect that the State of Texas motorboat registration records did not indicate a change of ownership. The issue of ownership is important because it is the owner of a vessel who is liable for a penalty when there has been a violation of the cited regulations, 33 CFR 173.27 and 46 CFR 25.35-1. Therefore, the proper determination of the identity of the owner of the vessel at the time of the alleged violations is a significant issue. The appellant asserted that he was not the owner of the vessel at the time of the violations. Thus, it is important that he should have been informed of all evidence on this issue. Not having been informed that the Hearing Officer intended to rely on information that the Texas motorboat registration records did not indicate a change of ownership, appellant could not have been aware of the need to provide rebuttal evidence, if available, that the boat had in fact been sold to another.

Although state law is controlling on the issue of ownership of a vessel, the Texas law cited does not deal directly with this aspect of ownership. The law does not define a legal transfer of title or specify when such a transfer occurs; it only states that an owner must notify the Department of Parks and Wildlife within a reasonable time after a transfer of ownership has occurred. Therefore, even if the appellant had been in violation of Texas law by not notifying the Department within a reasonable time after transfer, this lack of notification would not be conclusive evidence that the ownership of the vessel did not transfer hands. If the boat was in fact sold prior to the numbering and safety violations, then the appellant would not be liable.

The record also indicates that it was the Hearing Officer who made inquiries to the Texas Department of Parks and Wildlife to determine if there were any changes in ownership. Such inquiries are improper for the Hearing Officer to make while filling the role as an independent and impartial officer in an administrative hearing. These actions result in placing the hearing officer in an adversary role, similar to that of a prosecutor or investigator. The Hearing Officer may review only that evidence already in the record, or evidence of which he has taken official notice, in accordance with 33 CFR 1.07.

G-LMI ltr 16460/8 of 12 November 1980

"NEGLIGENT USE OF A VESSEL UNDER 46 U.S.C. 1461(d); SCOPE OF"

Two recent penalty appeal decisions were based upon an interpretation of the scope of the vessel negligent use prohibition set forth in 46 U.S.C. 1461(d). This interpretation is discussed in detail in the following paragraphs of this memorandum.

The negligent use found in the first case involved the failure of a vessel master to assure that cargo containers were stowed securely prior to the vessel's departure from its loading dock for sea. In the second case, negligent use was found when vessel officers in charge of the cargo unloading operations of their tank vessel, having notice of a severe cargo leak at one of the cargo pumps, continued unloading the cargo without taking any action to remedy the leak or mitigate its effects. A penalty was assessed against the master in the former case and against the vessel in the latter case. It is my view that the activity concerned in each case, i.e., the master's omission respecting the loading of cargo, and the responsible ship's officers' omission respecting the unloading of cargo, constituted "use of a vessel in a negligent manner" for the purposes of 46 U.S.C. 1461(d).

By reason of the enactment of Public Law 92-75 (the Federal Boat Safety Act of 1971), the reckless or negligent operation prohibition formerly classified to 46 U.S.C. 5261 was replaced by the negligent use prohibition presently classified to 46 U.S.C. 1461(d). The term "to operate" had been given the meaning "to navigate or otherwise use" under the former provision, while the term "use" under the latter means "operate, navigate, or employ" (46 U.S.C. 1452(4)). Under both statutes the operative term includes the concept of navigate and indeed the greater part of the enforcement action taken under them has been directed to negligent navigation. Recently it has been applied to the mooring of vessels (particularly barges). However, the generalized use of 46 U.S.C. 1461(d) to reach negligent activities not associated with vessel navigation has been rare.

Our research has disclosed no judicial or administrative opinions which discuss in a definitive manner the "non-navigational" scope of the statute. However, one judicial decision, one decision of the Commandant on the appeal of a penalty assessment, and an opinion of the Chief Counsel provide guidance.

U.S. v. LaBrecque, 419 F. Supp. 430 (N.J.D.C. 1976), involved a criminal prosecution under 46 U.S.C. 1461(d). In ruling on the defendant's motion for acquittal, the court rejected the argument that the actions of the vessel's captain at sea were the only basis for a prosecution under that provision. Holding that "[t]his review of 'use' is too restrictive," the court pointed out that the condition of the vessel and degree of its crew's experience prior to the commencement of the voyage were also properly the subject of inquiry thereunder.

409 L.B. 4 addressed a case involving the grounding of a vessel under the command of an intoxicated master. The penalty assessment had been made against the vessel and the Commandant upheld the assessment on the basis of the master's negligent "use", i.e., "operation", of the vessel. However, in addition, the Commandant took particular note of evidence in the record which indicated a consistent pattern of the vessel owners allowing intoxicated crews to operate their vessels. Calling attention to the broadened scope of 46 U.S.C. 1461(d) when compared to the pre-existing 46 U.S.C. 5261, the Commandant stated the following.

> The provision [46 U.S.C. 1461(d) thus extends the concept of negligence from "operation" under the repealed authority (46 U.S.C. 5261) to include a broader range of activities concerning the vessel, such as "employment." In other words, if the owners employ or permit the use of a vessel which is inherently unsafe and unseaworthy, they can be considered negligent and therefore, penalized.

Finally, G-L memo 16732 dtd 20 July 1978 inquires as to whether action could be taken under 46 U.S.C. 1461(d) in cases typified by two casualties then under review. The first casualty occurred when a longshoreman placed excessive strain on the boom of a vessel. The second casualty occurred when an unlicensed barge engineer allowed a drill water pump to be removed from its housing without taking measures to assure that the emergency drill water valve would not be opened. The question posed was whether the statute applied to the longshoreman or engineer in these cases. In responding, the Chief Counsel noted that a non-navigating violation of 46 U.S.C. 1461(d) can occur where a person negligently operates or employs a vessel. However, the Chief Counsel stressed that the statute applies to the employment or operation of a vessel, not to employment on a vessel or to the employment or operation of vessel equipment.

The Chief Counsel then analyzed the fact patterns presented by the inquiry in light of this principle. He explained that longshoring activities generally do not involve the degree of control over the vessel sufficient to consider them to be use of the vessel, and pointed out that the longshoreman was merely operating one of the vessel's winches. Turning to the second case presented, the Chief Counsel noted that the action in question concerned the safety of the entire vessel, and the person involved appeared to be in authority. However, he stated that neither of these facts control the question involved, stating that "[t]he failure to ensure the continued closure of a valve after removal of a drill water pump on an anchored drilling rig is more reasonably viewed as the use of a vessel equipment rather than the use of a vessel." Following these analyses, the Chief Counsel opined that neither case constituted a violation of 46 U.S.C. 1461(d).

From the foregoing, the following principles emerge.

a. A negligent act or omission unrelated to the navigation of a vessel may constitute negligent "use" of the vessel within the meaning of 46 U.S.C. 1461(d) if it concerns the vessel's operation or employment.

b. The act or omission concerned need not have occurred while the vessel was underway to constitute "use" within the meaning of 46 U.S.C. 1461(d).

c. When analyzing the fact pattern in a particular case concerning a possible non-navigational negligent "use" of a vessel in contravention of 46 U.S.C. 1461(d), the critical question which must be answered is whether the act or omission constituted the employment or operation of the vessel as a whole rather than merely the "use" of one or more items of the vessel's equipment.

As noted above, the first case addressed in paragraph 2 concerns the failure of a master to assure that cargo containers, loaded aboard his cargo carrying vessel, were properly secured prior to the vessel's departure from the loading dock. There is no doubt in my mind that the loading, stowing, and unloading of a cargo carrying vessel constitutes employment of a vessel by the vessel's owners. Similarly the master, as the owner's primary representative on board, has the fundamental responsibility to effectuate this employment in a safe manner. Unlike the longshoreman discussed in paragraph 7, the master, as the owner's representative, is responsible for the employment of the vessel relative to the loading, stowage, and unloading of cargo (including cargo containers) aboard it. Consequently, by failing to assure that the steps necessary to properly stow the cargo containers were taken, the master negligently "used", i.e., "employed", the vessel in violation of 46 U.S.C. 1461(d).

Turning to the second case addressed in paragraph 2, I noted that the penalty was not assessed against the person who acted or failed to act in a negligent manner, but rather against the vessel which was so "used." Notwithstanding this procedural distinction the basic issue for present purposes is the same. In order for the vessel to be subject to an assessed penalty, a violation of 46 U.S.C. 1461(d) must have occurred. That is, a person must have "used" the vessel in a negligent manner.

However, there is a substantive difference between the two cases. Unlike the first case, the negligent "use" in the second case does not involve an act or omission of the master but rather of the Chief, Second, and Third Mates. Nothing in the record of the case indicates that any of these mates bore a responsibility comparable to that of a master, standing in place of the owner as the vessel's employer. Consequently, there is nothing upon which a finding may be based that any or all of the mates "employed" the vessel.

Notwithstanding this difference, however, a basis for finding vessel "use" does exist. A cargo carrying vessel is being "operated" when it loads and unloads cargo just as surely as it is being "navigated" when it travels between its loading and unloading ports. The record in this case indicates that the Chief Mate (and perhaps the other mates as well) was in charge of the unloading operation. Unlike the longshoreman and engineer discussed in the 1978 Chief Counsel's memo, the mate was indeed operating the vessel, not merely a single winch, pump, or valve on the vessel. Consequently, by failing to take any remedial action when faced with a dangerous situation involving the vessel's operation, which operation (the unloading) at the time was within his responsibility and under his control, the mate "used", i.e., operated, the vessel in a negligent manner in violation of 46 U.S.C. 1461(d). Such a violation having been established, the vessel is liable for the penalty assessed.

G-LMI memo 16732 of 12 November 1980

"FWPCA, APPLICATION OF SECTIONS 311 AND 312 TO PUBLIC VESSELS"

The Chief Counsel was asked for clarification of the applicability of Sections 311 and 312 of the FWPCA to public vessels. At the outset, it must be recognized that section 312 does not apply to foreign public vessels. 409 L.B. 12 concerned with the meaning of "person" in section 311 of the FWPCA, concluded that municipal corporations are persons. The opinion excerpted at 410 L.B. 25 found that ferries owned and operated by the State of Alaska are public vessels within the meaning of Subsection 311(a)(4) of the FWPCA, because the state operates the vessels at a "monetary deficit, which necessitates support from the general revenues of the state and since it would appear that the state has no intention of attempting to operate the ferry system as a profit-making entity." The "ferries are operated... as a public service to facilitate transportation in areas of that State where transportation by railroad or highway is nonexistent or marginal. [The purpose of addressing funding of operations] was to distinguish between an operation which is truly a public service and one which is for all intents and purposes a self-sustaining commercial enterprise."

Both Sections 311 and 312 of the FWPCA define a public vessel as "a vessel owned or bareboat-chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when such a vessel is engaged in commerce."

Since the definition of a public vessel is the same for both Sections 311 and 312, the interpretation of the phrase is the same. A vessel which is a public vessel under Section 311 is also a public vessel under Section 312. The critical words in the definition are "owned... and operated" and "except when such a vessel is engaged in commerce." The commerce exception is the more ambiguous phrase.

The public vessel status of a Tennessee Valley Authority tug has been addressed by the Chief Counsel. In a Section 311 civil penalty case, the tug was held not to be a public vessel because it was engaged in commerce. The tug was used in moving, towing, and maneuvering local and empty barges at the coal-unloading docks. This activity constituted a part of the authority's "electricity generating process which, in turn (since the electricity produced is commercially marketed), constitutes an activity 'engaged in commerce.'" 420 Law Bulletin 12.

The Tennessee Valley Authority's non-public vessel status was reaffirmed in a later opinion which concerned the Tank Vessel Act (TVA). The opinion referenced 420 Law Bulletin 12 and recognized that both the FWPCA and the TVA were remedial, safety and pollution prevention statutes in which exceptions to their provisions are to be narrowly construed. The TVA defines public vessel similarly to the FWPCA Sections 311 and 312 definitions, but adds a definition of "commercial service." This phrase "means all types of trade or business involving the transportation of goods or persons, excluding the service performed by combatant vessels." 46 U.S.C. 391a(2)(H). The opinion stated that, "if a governmental agency is engaged in an activity which is in the nature of a business, even through a statutorily established business, those non-combatant vessels used in the business are not public vessels."

Though the TVA definition of commercial service is not viewed as an implicit amendment to the FWPCA, nevertheless, it represents a Congressional understanding of what constitutes commercial service. I, therefore, conclude that the opinion stated in 410 Law Bulletin 25 too narrowly construes commercial service. The latter opinion concerning the TVA more accurately represents the current understanding of the phrase "commercial service," and the guidance therein should be followed.

As stated in the latter opinion, before a determination can be made for any particular vessel, the facts concerning its usage must be known and evaluated. For instance, if the Alaska ferries charge passengers for the ride, this fact would suggest that the ferries are used as a business involving the transportation of persons, notwithstanding the fact that the ferries operate at a loss. Many businesses operate at a loss, but that does not mean they are not commercial enterprises. (The FMC does not consider these ferries to be public vessels for purposes of Subsection 311(p) of the FWPCA.)

If the ferries are not public vessels, then the application of the penalty provisions comes into question. Recent cases applying 33 U.S.C. 1362(5) clearly establish that States, and State and municipal corporations, are persons within the meaning of section 311 FWPCA. See U.S. v. Massachusetts Bay Transportation Authority, 614 F.2d 1292 (2d Cir. 1979) memo aff'g on the opinion of the district court, 481 F. Supp 4 (S.D.N.Y. 1979). This holding must, by analogy, apply to Section 312 FWPCA. Thus, when owning and operating non-public vessels, States, as persons, are subject to civil penalties for violations of Sections 311 and 312 FWPCA.

It should be noted that if the State owned and operated vessel is a public vessel, it nevertheless is subject to the prohibition on the discharge of oil or a hazardous substance.

Subsection 311(b)(3) declares absolutely that the discharge is prohibited. Subsection 311(b)(1) states that it is the policy of the United States that there should be no discharges. Thus, even though no penalty authority exists, the State public vessel should be encouraged to abide by the prohibition. Discharges by a foreign public vessel could be referred to the flag's government. Of course, authority does not exist under Section 311(m) to board public vessels.

With respect to Section 312, the applicability to public vessels is somewhat different. "New vessel" and "existing vessel" do not exclude public vessels. However, "person" does not include one of the enumerated class on board a public vessel. The basic requirement for certified marine sanitation devices (MSD) applies to new and existing vessels. The standards and regulations apply to vessels owned and operated by the United States, unless the Secretary of Defense finds that compliance would not be in the national interest. 33 U.S.C. 1322(d). It is, therefore, apparent that Congress intended public vessels to comply with the standards for MSDs. However, public vessels may not be boarded [33 U.S.C. 1322(1)]. There is no civil penalty that can be assessed if a public vessel operates with an inoperable MSD, because only persons (which, by reason of 33 U.S.C. 1322(a)(8), do not include those on board a public vessel) can be assessed penalties for a violation of 33 U.S.C. 1322(h)(4). See 33 U.S.C. 1322(j). If a State public vessel is found to operate without an operable MSD, the matter should be referred to the State agency responsible for the vessel. If a foreign public vessel is known not to have the MSD, the matter could be referred to the flag government, through the State Department. This analysis controls to the extent it differs from 410 L.B. 25. The Department of Defense is responsible for enforcing its MSD regulations against its public vessels.

In summary, the determination of whether a vessel is a Section 311 or 312 FWPCA public vessel requires an analysis of the facts concerning the use of the vessel. "Engaged in commerce" is to be construed broadly so as to narrow the exception from the sections. As a general guideline, commerce includes all types of trade or business involving the transportation of goods or persons. Though public vessels are not subject to the enforcement or penalty provisions of either Section 311 or 312, the basic prohibitions apply and public vessels should be encouraged to comply. Violations, if detected, can be referred to the agency responsible for the vessel; in the case of a foreign public vessel, to the flag government. Non-public vessels operated by States are subject to enforcement and penalty action.

G-LMI memo 16450 of 26 November 1980

"FWPCA; USE OF SECTION 311(k) FUND FOR RESTORATION"

The Chief Counsel was asked for a determination on the appropriateness of expending sums in the revolving fund established under Subsection (k) of Section 311 of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1321(k), for the purpose of restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance. For the reasons set forth below, it was determined that sums in the fund which have been recovered under 33 U.S.C. 1321(f)(4), in respect of particular natural resources damaged or destroyed, are to be used for the restoration or rehabilitation of those resources or the acquisition of equivalent resources. However, no other sums in the fund may be used for those purposes.

It is important to note that the opinion expressed above does not interpret Section 311 FWPCA so as to allow access to the Subsection (k) fund for the purposes of natural resource restoration and replacement in the same manner as for the purposes of Subsections (c), (d), (i), and (1) of Section 311 FWPCA and the Intervention on the High Seas Act, 33 U.S.C. 1471 _et. seq_. Access for the purposes of those latter provisions is on an "as needed, when needed" basis. Access for resource replacement and restoration is limited to sums which have been recovered under 33 U.S.C. 1321(f)(4), after they have been recovered.

At the present time, the regulations controlling the meaning to be given to the term "removal" within the context of 33 U.S.C. 1321(c), 40 CFR Part 1510, and the regulations issued by the Coast Guard (pursuant to Section 2(4) of Executive Order 11735) concerning the administration of the revolving fund do not permit monies in that fund to be used for the restoration and replacement of natural resources, 33 CFR 153.401 _et seq_. Of course, in certain limited cases, the restoration and replacement of resources may fall within cost categories which are compensable from the fund, _e.g_., 33 CFR 153.407(a)(4).

Subsection (g) of section 58 of the Clean Water Act of 1977 amended Subsection (f) of Section 311 by adding the following two paragraphs:

> (4) The costs of removal of oil or a hazardous substance for which the owner or operator of a vessel or onshore or offshore facility is liable under Subsection (f) of this Section shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of

> oil or a hazardous substance in violation of Subsection (b) of this section.
>
> (5) The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.

On 4 August 1977, when S.1952 was under consideration by the Senate, Senator Muskie noted the following with respect to these provisions.

> Finally, the committee approved language that would permit costs expended by the Federal government or any State government for the restoration or replacement of natural resources damaged by a spill of oil or hazardous substance to be paid by the contingency fund. This provision authorizes the President, or a State representative, to act on behalf of the public as trustee of natural resources to recover such costs. This is an important protection for these natural resources, and this particular provision is fashioned after a similar one in the Deepwater Ports Act (sic). A Legislative History of the Clean Water Act, Environmental Policy Division of the Congressional Research Service, Volume 4, Serial No. 95-14 (October 1978) at page 812. (Hereinafter referred to as History).

On 15 December 1977, during the Senate's consideration of the Conference Report on H.R. 3199, Senator Muskie restated the views he expressed on 4 August 1977. See History, Volume 3 at page 466.

On their face, paragraphs (4) and (5) of Section 311(f) accomplish only three things: (1) extend the strict liability causes of action provided under paragraphs (1), (2), and (3) of Subsection (f) of Section 311 FWPCA to resource restoration and replacement costs and expenses of the Federal and State governments; (2) establish the President and the States' authorized representatives as trustees for the recovery of those costs; and (3) direct that the "sums recovered" be used for certain purposes respecting the damaged or destroyed resources. Notably, the statutory provision makes no mention of the Subsection (k) fund or any other "contingency fund" in the terms used by Senator Muskie in his comments. Consequently, a question arises as to the meaning which should be given to those comments in the interpretation of paragraphs (4) and (5).

In order to understand Senator Muskie's reference to "contingency fund" it is helpful to consider the second sentence of 33 U.S.C. 1321(k) which states: "Any other funds [i.e., funds other than those appropriated to the revolving fund] received by the United States under this section shall also be deposited in said fund for such purposes [i.e., the purposes of Subsection (c),(d),(i), and (1)]." It appears that Senator Muskie was making a somewhat oblique reference to this provision. By reason of this provision, the monies recovered by the United States under 33 U.S.C. 1321(f)(4) are to be deposited in the Subsection (k) revolving (or "contingency" in the Senator's words) fund rather than in the miscellaneous receipts account of the Treasury's general fund pursuant to 31 U.S.C. 484.

Further, the Senator's comments may be seen to call attention to the effect of the second sentence of the new paragraph (5) which specifies the use to which the recovered sums so deposited may be put. This sentence clearly limits that use to the restoration and rehabilitation of and acquisition of equivalents for the damaged or destroyed resource. As such, it serves as a subsequent statutory modification (or amendment) of the phrase "for such purposes" in the second sentence of 33 U.S.C. 1321(k) referred to in the prior paragraph. Such a modification is not without precedent. In 1974, Congress enacted the Intervention on the High Seas Act, Section 17 of which made the 33 U.S.C. 1321(k) fund available for federal actions and activities taken under Section 5 of that Act, 33 U.S.C. 1486. A notable distinction between the two modifications however is that 33 U.S.C. 1321(f)(5) merely makes the "sums recovered" under 33 U.S.C. 1321(f)(4) available, while 33 U.S.C. 1486 makes the entire fund available without limit for "intervention" actions and activities.

In addition, Senator Muskie's reference to the Deepwater Port Act (33 U.S.C. 1501 et. seq.) confirms the analysis of the two paragraphs in question (33 U.S.C. 1321(f)(4) and (5)) set out in paragraph 5 above. It would appear that Section 18 of that Act, 33 U.S.C. 1517, is the specific Section to which that remark was directed since that Section specifically concerns liability and compensation relating to oil pollution. Under Section 18 two mutually exclusive classes of claims may be made: claims for "clean-up costs" (comparable to "removal" costs under Section 311 FWPCA) and claims for "damages". It is the latter class, "damages", which includes "damages ... involving natural resources of the marine environment....", rather than the former, "clean-up costs", 33 U.S.C. 1517(m)(2). Consequently, the Senator's remark would indicate that, except for the purposes of 33 U.S.C. 1321(f), paragraphs (4) and (5) were not intended to modify the meaning of the term "removal" as otherwise used in the Section.

I am not making any opinion on the question as to whether the definition of the term "removal" found in Section 311(a)(8) of the FWPCA is broad enough to include restoration of public and private property, natural resources, or both. In view of the President's (CEQ's) broad authority under Section 311(c)(2) of the FWPCA, it would appear that this issue appropriately might be addressed within the context of modifications to the National Contingency Plan.

G-LMI memo 16450 of 26 November 1980

"RESPONSIBILITY FOR PREPARATION OF DANGEROUS CARGO MANIFESTS"

The basis for the dismissal of two civil penalty cases was that, on the dates of the alleged offenses, 46 CFR 176.30(a) placed the duty of preparing the dangerous cargo manifest solely upon the master. On 23 August 1979, that regulation was amended (44 Fed. Reg. 49458). As a result of that amendment the following persons are each charged with the proper preparation of that manifest: the carrier, its agents, and any person designated for the purpose by the carrier or agents.

G-LMI ltr 16616/7 of 1 December 1980

STATUS OF VESSELS' AGENTS IN CIVIL PENALTY PROCEEDINGS

The party charged and ultimately found to be liable in a civil penalty case was a foreign vessel. The owner was given notice of the charges against it and a copy of the notice was sent to the vessel's agent.

Within the response period prescribed, both the agent and the owner responded. The owner's response was received after the receipt of the agent's response. A hand written notation on the owner's letter states: "Already received reply & penalty assessed. File". The owner's letter appears to raise an issue not addressed in the agent's letter. The letter of assessment was addressed to the agent. The record contains no indication that the owner was informed of the assessment, either by the agent or the Hearing Officer.

Normally, especially in cases involving foreign owners of vessels, it is appropriate to recognize submissions made by agents of the owner as having been made on behalf of the owner where it may be otherwise implied from the record that the agent is empowered to so act. This is the case even where the agent does not specifically state that it is acting on behalf of the owner for purposes of the penalty assessment proceedings. The violation report identified the owner's agent. In general, such agents are often empowered to act for owners respecting civil penalty assessment proceedings.

Further, the agent's response followed the notification made to the owner of the pending proceedings. Accordingly, until the time that the Hearing Officer received the owner's letter it was proper for him to draw the implication that the agent's submission was made on the owner's behalf.

However, when the Hearing Officer received the owner's letter which (1) made no reference to the agent's submission, (2) gave no indication that the agent was acting on its behalf for purposes of the proceedings, and (3) apparently asserted a different basis for contesting the assessment, the support for that implication was removed. At that point appropriate steps should have been taken by the Hearing Officer to ascertain whether, in fact, the agent was empowered to act and was acting on the owner's behalf in this matter. The case record is void of any indication that steps of this nature were in fact taken. In fact the notation referred to in paragraph 3 above tends to show that this was not done.

Once the owner had expressed itself in a manner inconsistent with the assumption that its formerly apparent agent was acting on its behalf, without some additional demonstration in the record that the agent was so acting, it was improper to ignore the owner and inform only the agent of the assessment.

G-LMI ltr 16460/7 of 1 December 1980

POLLUTION PREVENTION REGULATIONS, RESPONSIBILITY FOR DETERMINING APPLICABILITY

In a recent penalty case, the appellant admitted that certain pollution prevention regulation violations occurred, but argued that the penalty was unfair and unjust because he had made an effort to determine the applicability of the regulations and the capacity of the vessel to which his truck was transferring oil. He asserted that the vessel's personnel are at fault for providing him with incorrect information on these matters. The appeal was denied for the reasons stated below.

I would like to clarify the Hearing Officer's statement regarding with whom the responsibility lies for determining whether the regulations apply. The regulations state specifically that their applicability is based on the fuel capacity of the vessel. Thus, each party involved in a transfer has an independent duty to ascertain whether it is engaging in a regulated activity. In making this determination, a party who chooses to rely solely upon information furnished by another bears the risk that such information may be incorrect. Therefore, your statement that the responsibility for determining whether or not a particular transfer is subject to the regulations rests solely with the vessel owner is inaccurate.

G-LMI ltr 16600/7 of 18 December 1980

CIVIL PENALTY PROCEDURES - ROLE OF THE HEARING OFFICER

The Hearing Officer, in his letter of 20 February 1980, abandoned his impartial role and decided issues of fact and law, after receiving a hearing request. These decisions were made without according the alleged violator a hearing and without awaiting the submission of any evidence that the alleged violator might have presented at such a hearing. 33 CFR 1.07-25 requires counsel for a party, in requesting a hearing, to specify the issues which are in dispute. The adversarial nature of the Hearing Officer's letter of 20 February 1980, and the clear indication in it that factual and legal matters which were specified as issues in the request for a hearing had already been resolved prior to any hearing, destroyed the appearance if not the substance of impartiality.

G-LMI ltr 16750/9 of 15 December 1980

REQUIREMENT FOR SHIPPING ARTICLES

Appeal was taken from the assessment of a civil penalty for shipping a crew without an agreement.

Regarding the reported violation of 46 U.S.C. 564, this appeal noted that Section 564 applies to vessels "bound from a port on the Atlantic to a port on the Pacific", and that the port the vessel departed from, Corpus Christi, Texas, is a Southern Port. The contention was that Section 564 is not applicable to this situation. In support of that position, the appeal cited Bernuth, Lenbecke Co. v. Sergeant, 217 F.2d 704 (5th Cir, 1955), for the proposition that Houston, Texas was not a port on the East or Atlantic coast, but rather a port on the Southern coast.

Preliminarily, I note that Bernuth involved a suit in admiralty brought by seamen to recover an additional month's wages. The suit involved the interpretation of a term in a set of shipping articles and was based on 46 U.S.C. 594. In no way did the case involve the application of 46 U.S.C. 564.

As a result, even though Houston was held not to be a port on the "East Coast of the U.S." for the purpose stated, the case is not on point.

The term in question, "port on the Atlantic", must be read within the overall context of the statute and the purposes for which it was enacted. The statute was enacted to require the making of agreements for certain vessels making certain voyages. The relevant provisions require agreement with respect to vessels of 75 tons or upward which are "bound from a port on the Atlantic to a port on the Pacific, or vice versa". Notably the statute does not employ an East Coast/Southern Coast distinction, nor, indeed, does it utilize the word "coast" at all. These observations are instructive, for they serve to dispel any notion that a cramped reading must be given to the statutory language, and indicate if such an indication is indeed necessary, that language should be read broadly enough to achieve the obvious legislative intent.

Congress sought in the enactment of this legislation to provide a degree of protection for certain merchant seamen, including the making of a written agreement. The exclusions which Congress made to this general protection were very carefully specified in the statute, indicating the intent to give a broad reading to the statutory language prescribing the breadth of the coverage for the protection it affords. Consequently it would contravene this legislative intent to find that the protection provided extends to seamen commencing or terminating a voyage in Miami, but is not afforded to similarly situated seamen whose voyage commences or terminates in Tampa. The reading of the statute which was urged would require such a clearly illogical and unintended result.

In view of the foregoing, the Coast Guard has consistently taken the position that the term "port on the Atlantic" as used in 46 U.S.C. 564, includes ports such as Corpus Christi, Texas, located on the Gulf of Mexico. That such reading constitutes a reasonable interpretation of the term "Atlantic" finds support in Merchants' Mutual Insurance Co. v. Allen, (La.) 121 U.S. 87, 7 S.Ct. 821, 822, 30 L.Ed 358. That case involved an insurance policy covering a ship in the Atlantic trade. The coverage was held to include the Gulf of Mexico, as part of the Atlantic Ocean. In light of the above, I find that 46 U.S.C. 564 is applicable to the voyage from Corpus Christi, Texas, to Long Beach, California.

G-LMI ltr 16460/11 of 16 December 1980

RECONSIDERATION OF AUXILIARIST CLAIM FOR THEFT OF THE BOAT TRAILER USED TO TRANSPORT HIS AUXILIARY FACILITY

In early September the Claims & Litigation Division routinely received and denied a $1,745.84 claim for the theft of a facility boat trailer. On 3 October, the District Commander forwarded a request for reconsideration of the claim. The facts giving rise to this claim are:

Claimant is an exceptional member of the Coast Guard Auxiliary in Mobile, Alabama. The incident giving rise to this claim is an excellent example of his dedication. He was telephoned at his home at 2130 on Sunday evening to assist a vessel which was disabled 10 miles off the coast. He and his crew trailered his auxiliary facility to a well-lighted launch ramp, launched the vessel, parked the car and trailer, and successfully accomplished the assigned SAR mission. When claimant returned to the launch ramp, his trailer was missing, apparently stolen. Attempts to recover the trailer through the local police have been unsuccessful.

Title 14 U.S.C. §830 authorizes payment of auxiliary claims for repair or replacement in accordance with ". . . applicable regulations, ..." These regulations, published in the 4 March 1976 Federal Register and codified in 33 CFR Subpart 25H, insofar as they establish substantive rights, are an integral part of the statute with the same force and effect as the basic statute.

Auxiliarist's claim cannot be paid under these current regulations:

a. The regulations unequivocally state that ". . . [a] claim is not payable if it . . . [r]esults from theft." See 33 CFR §25.805(e).

b. Although the above is dispositive, the threshold question really is whether, under the circumstances, claimant's boat trailer was either a "facility" or "equipment of a facility" at the time of the loss. While the statutory language (first enacted in 1939) did not contemplate the exponential growth -- and use -- of trailerable boats, we have established, by regulations, times when a trailer is to be treated as either an indivisible part of the facility transported or equipment of that facility, specifically, when the trailer is being used to get the facility to or from the launching area. The trailer has not been considered either as indivisible part of the facility or equipment of the facility when parked at the launching ramp while the facility is underway on its mission. Similarly, the motor vehicle used to tow the trailered facility to the launching ramp is not considered to be either a part of the facility or equipment of the facility. See 25 CFR §25.803.

It has been suggested that the cited regulations as they apply to this claim be "waived" and the claim then paid. While the equities of this situation augur payment of the claim, it is well established as a matter of law that an agency is bound by its own regulations and the Commandant may not waive the regulations so that this claim can be paid.

See 51 Comp. Gen. 30 (1971). Nor is after the fact amendment a solution. The Comptroller General has declared invalid the attempt to retroactively amend similar regulations. (The Joint Travel Regulations were amended (in December) to be retroactive to August. A military member who had traveled in October resubmitted his claim for the higher amount authorized by the December amendment. The Comptroller General ruled that the military traveler was entitled only to the amount authorized by the regulations actually in effect at the time of the (October) travel.) See 33 Comp. Gen. 318 (1954).

The Chief, Claims & Litigation Division, has also determined, after careful review, that this claim is not payable under the Federal Tort Claims Act, the Military Claims Act, nor the Non-Scope of Employment Claims Act. As the claim is not payable under any administrative claims act, denial of the claim will be affirmed, upon reconsideration.

As emphatically illustrated by this incident, the 1976 regulations fail to provide sufficient authority for payment of certain auxiliary claims. These regulations have been extensively discussed by members of our staffs (particularly LCDR BISSELL and Mr. Chaskes) during the past year. Virtually all present auxiliary claims regulations (including those cited in paragraph 3) will be deleted by a soon-to-be-effective amendment to 33 CFR Part 25. Revised rules for auxiliary claims will be in the Claims Manual. Theft claims will no longer be barred. In addition, a boat trailer will be considered "equipment of the (trailered) facility" to and from the launching ramp and while parked at the launching ramp awaiting the return of the facility. Hopefully, these and other changes developed by our staffs, and the delegation of increased settlement authority will permit prompt payment of all meritorious auxiliary claims and thereby contribute to the effectiveness of this important program.

G-LCL memo 5890/310 of 5 November 1980

CONSIDERATION ON THE IDPL OF FORMER ADPL OFFICERS TWICE FAILING OF SELECTION TO LCDR OR BELOW

The question presented is whether an officer, Regular or Reserve, who has twice failed of selection to Lieutenant Commander or below while on the Active Duty Promotion List (ADPL) may subsequently be considered for promotion to the same grade on the Inactive Duty Promotion List (IDPL) of the Coast Guard Reserve.

An ensign in the Regular Coast Guard who fails of selection for promotion a second time must have his commission revoked. [Article 12-A-13, CG-207.] From that, I would infer a policy against offering such a person a Reserve commission.

However, there is no statute prohibiting such an appointment. Section 282 of Title 14 makes it clear that the Coast Guard must remove a Regular Coast Guard lieutenant (junior grade) from active duty, either by discharge or retirement, after he or she has twice failed of selection for promotion to the grade of lieutenant. Similarly, Section 283 of Title 14 provides for removal from active duty of Regular Coast Guard officers serving in the grade of lieutenant, except that the Secretary has authority to continue a lieutenant on active duty up to the last day of the month in which he or she completes twenty years of active service. However, neither Section 282 nor Section 283 addresses directly how discharge of a Regular Coast Guard officer affects the officer's potential for promotion thereafter as a member of the Coast Guard Reserve. The legislative history of Public Law 93-283, 24 September 1963, which changed the promotion system for Regular Coast Guard officers to "best-qualified", indicates that the principal focus of the legislation was on improving the quality of officers on the ADPL and their opportunities for promotion on active duty. There is no indication that Congress or the Coast Guard concerned themselves with whether any officer removed from the ADPL as the result of non-selection might subsequently appear on a promotion list in the Coast Guard Reserve. The Coast Guard was primarily concerned with creating a method of forced attrition to replace the unsatisfactory natural attrition which, under the fully qualified system, was leading to stagnation at the higher grades and reduced career incentives for young officers. Therefore, I cannot infer from Sections 282 and 283 of Title 14 an intention on the part of Congress to bar from promotion in the Reserve a person who had been discharged from the Regular Coast Guard under those provisions of Title 14.

Once a Regular officer is discharged from the Coast Guard he or she becomes a civilian, entitled to equal treatment with other civilians. This means that if an appointment in the Coast Guard Reserve is subsequently given to the person, he or she should not suffer any special penalty because of previous failures of selection while on ADPL as a Regular Coast Guard officer. Officers with two or more failures of selection while on active duty in other armed forces are not considered by the Coast Guard as having twice failed of selection when they are given a commission in the Coast Guard Reserve.

A Reserve officer could be released to inactive duty after having twice failed of selection to the grade of Lieutenant Commander or below while on the ADPL. If so, he or she would be considered as having twice failed of selection on the IDPL. [14 U.S.C. 728(d).] Nevertheless, such an officer may be retained in an active status for a period prescribed by the Secretary and given additional opportunities for promotion on the IDPL. [14 U.S.C. 740(b); 14 U.S.C. 732; 33 CFR 8.3109.]

G-LGL memo 1920 of 9 December 1980

PROPOSED COAST GUARD MEMORIAL PARK

Certain improvements to the waterfront property adjacent to the Coast Guard Headquarters building are proposed. The proposal is presented in three parts. The first part basically includes improvement of the grounds, erection of a flagmast, construction of walkways, and repair of the seawall at an estimated cost of $140,000. The second part includes construction of a trellis over the trash collection area at an estimated cost of $64,000. The third part includes construction of a trellis over the mezzanine at an estimated cost of $110,000. (I understand that the first two parts only are now being considered at a combined cost of $204,000.) The basic question is what is necessary to make appropriated funds available for the proposed improvements.

The key facts of determining the answer to this question are that most of the real property to be improved is privately owned, the United States has no property interest in the privatly owned portion, and that the real property to be improved that the United States does own is under the administrative control of another Federal agency, the Park Service. (Note that the United States does not have a leasehold or any other real property interest in the headquarters building or the land upon which it sits, but only a leasehold interest in space within the building.) A memo from the Chief, Office of Engineering states that GSA has advised that all that is required to make appropriated funds available for these improvements is a line item in the Coast Guard's FY 1982 budget. Although this insertion of a line item in the GSA budget may often suffice for GSA purposes, since the GSA is in the property improvement business and has extensive statutory authority for it, for the reasons discussed in the remainder of this memo, I cannot concur that such a line item alone in the Coast Guard budget would serve a similar useful purpose.

As for the privately owned property, the established rule is that appropriated funds may not be used for the permanent improvement of privately owned property by an agency of the United States in the absence of *express* statutory authority, except in "exceptional" cases. (18 Comp. Gen. 463; 19 *id.* 679; 20 *id.* 927; 35 *id.* 715; 38 *id.* 143; 42 *id.* 480; 43 *id.* 738; 46 *id.* 25; 47 *id.* 61; 53 *id.* 351; 55 *id.* 872; B-194031 of May 1, 1979) Exceptional cases are defined as those that meet *all* of the following tests:

a. Appropriations are otherwise available, provided the improvements are determined to be incident to and essential for the effective accomplishment of the authorized purposes of the appropriations.

b. The expenditures are in reasonable amounts.

c. The improvements are used for the principal benefit of the Government.

d. The interests of the Government in the improvements are fully protected. (42 Comp. Gen. 480, at 483-484)

The GSA contention that a budget line item is sufficient to circumvent these tests is only valid if there is specific statutory authority to expend appropriated funds to improve private property. Since the Coast Guard does not have specific statutory authority to improve private property, the tests are applicable, and inserting a line item in the budget would by itself serve no useful purpose.

In applying the first test of the rule, availability of appropriations as to purpose, the Comptroller General has generally allowed an expenditure only where there is a fairly specific statutory purpose to which the proposed expenditure to improve private property is incidental and essential. The Public Health Service was allowed to expend appropriated funds for alterations to a contractor's facilities under specific statutory authority to conduct a particular type of research. Monies had been specifically appropriated to fund research contracts under the authority of the statutory provision. The research involved was of the type specifically named in the statute. The contractor was a scientific institution with the most appropriate facilities, personnel and professional proficiency, and location with the ideal climate for the specific research project. (42 Comp. Gen. 480, at 481, 483, 485; see also 46 Comp. Gen. 25, at 26, 29-31) An Immigration and Naturalization Service expenditure for the repair of international boundary fences on private property was also allowed. The INS had an appropriation, "for expenses not otherwise provided for, necessary for the administration and enforcement of the laws relating to immigration, and alien registration, . . . acquisition of land as sites for enforcement fence and construction incident to such fence." The fences were necessary for INS enforcement of the laws for prevention of illegal entry. However, in this case, the expenditure was allowable only if the INS acquired a property interest, such as an easement or lease, in the land upon which the fence stood for a term lasting through the useful life of the fence. (55 Comp. Gen. 872, at 873-874) The Comptroller General disallowed proposed Veterans Administration expenditures to construct a hospital on leased property and to partially fund parking facilities on private property adjacent to a VA facility for shared use with a co-funding private hospital. VA statutory authority to construct hospitals, "on sites already owned by the United States or other sites acquired by purchase, condemnation, gift, or otherwise" and authority to procure necessary space, "for administrative, clinical, medical, and outpatient treatment purposes by lease, purchase or construction of buildings" were found insufficient for construction of a hospital on leased land. The VA's Administrator's authority to "contract, by lease or otherwise, with responsible persons, firms, or corporations, for the operation of such parking facilities, under such terms and conditions as he may prescribe, and without regard to the laws concerning advertising for competitive bids," was found insufficient for pro rata funding of the parking facility on private land. (47 Comp. Gen. 61, at 62-63, 65-66) In another decision, a proposed VA expenditure for the repair and renovation of the Congressional Cemetery in Washington, D.C., was disallowed. The relevant VA appropriation was "for necessary operating expenses of the VA not otherwise providing for, including . . cemeterial expenses as authorized by law." The VA proposed to repair and renovate the entire cemetery, even though only part of it was owned by the United States. The VA cited the well-established historical and architectural significance of the entire cemetery as well as waist-high weeds, vandalism, roving wild dogs, and snakes. The VA further cited the legislative history of the appropriations provision, which included in the House Report the statement that, "$225,000 is included for repair and renovation of the Congressional Cemetery at Washington, D.C." The VA averred that this amount clearly represented the amount necessary to renovate and repair the entire cemetery, and the Comptroller General concurred in this observation. Nevertheless, the Comptroller General, citing the rule on improvements to private property, disallowed the proposed improvements (B-194031 of May 1, 1979).

As for the proposed Coast Guard improvements, the Coast Guard must identify a fairly specific statutory purpose for which the proposed expenditure to private property could be deemed incidental and essential. The inclusion of a line item in the budget for a park would not be sufficient in the absence of legislative authority to improve private property. There is no statutory basis for budgeting for such an improvement to private property. (For consideration also is the fact that Congress has historically been more restrictive on real property acquisition and use within the District of Columbia, enacting specific statutes for individual proposals and vesting general authority predominantly in only a few agencies, GSA, the Park Service, and the National Capital Regional Planning Council. See, e.g., 40 U.S.C., Chapter 1 and 16 U.S.C., Chapter 1-3. As to the latter, however, the Coast Guard proposal might be properly characterized as something other than a "park" or "memorial.")

In applying the second test, reasonableness of the expenditure amount, the Comptroller General has been the least clear in expressing a general standard. The Comptroller General has stated that the amount should not be "extravagant or disproportionate to the needs to which the facilities are intended to be put by the Government." (35 Comp. Gen. 715, at 716; 38 Comp. Gen. 143, at 146) No case seems to discuss what "extravagant" means. It would, on its face, appear to be a highly subjective standard. As for what is "disproportionate," improvements to private property that cost approximately 21% of the total cost of the Government contract under which the improvements were to be used have been allowed. (Note also that the Comptroller General recognized the relationship of the improvements to the authorized government purpose, in the PHS research contract.) (46 Comp. Gen. 25, at 26, 21) At the other end of the scale, the cemetery case, improvements to private property that cost approximately 99 times the amount to be expended for related Government purposes were not allowed. (Here, there was recognition that the relationship of the improvements to the related, authorized government purpose was at best tenuous.) (B-19403 of May 1, 1979)

Satisfaction of the third test, use of the improvements principally benefits the Government, essentially depends upon a showing that the Government receives an obvious benefit and that the private property owner receives little or no benefit, either during or after the Government ceases to use the improvement. In the case of the PHS research contract with the scientific institution (a zoo), PHS clearly showed that the specialized improvements involved would not be useful or beneficial to the contractor after completion of the contract and, relatedly, clearly showed that the improvements were necessary to enable the contractor to conduct the research project. (42 Comp. Gen. at 495) The Comptroller General thus found the third test satisfied. In the Congressional Cemetery case, repair and renovation of the privately owned portion by the VA clearly benefited the private owners and could not be justified as necessary for upkeep of the government-owned areas. The only real benefit to the Government the VA could show was aesthetic. This was found insufficient. (B-194031 of May 1, 1979)

Satisfaction of the fourth test, full protection of the Government's interests, which is related to the third, apparently occurs upon a showing that the private property owner receives no benefit from improvements made at Government expense after the Government's use ceases. There are several ways this may be satisfied. One is compensation to the Government from the property owner for the value of the improvements. (46 Comp. Gen. 25, at 31) Another is showing of no useful value to the property owner after Government use ceases, such as when the INS acquired a property interest in the land for the boundary fence for a term lasting through the useful life of the fence. (55 Comp. Gen. 872, at 874; see also, 35 Comp. Gen. 715, at 716.) The most common, however, is a showing that the improvements are temporary and title in them remains in the United States with a right to remove. (See 43 Comp. Gen. 738, at 739; see also 15 Comp. Gen. 761, 20 Comp. Gen. 927, 35 Comp. Gen. 715.) Obviously, retention of title and right to remove must be secured in writing before the Government may place temporary improvements on the private property. What remains to be determined is whether the improvements are truly "temporary". The basic definition of temporary improvement is that it is "readily removable." In the Comptroller General decisions construing this, there appears three fundamental characteristics of that which is readily removable: removal causes no injury to the private property; removal causes no injury to the improvement itself; once removed, the improvement is reuseable. Examples of improvements that were found not to have these characteristics are: roadways and walkways (38 Comp. Gen. 143, at 144; 29 Comp. Gen. 279, at 280); concrete bases for cattle guards (38 Comp. Gen. 143, at 146); fence (55 Comp. Gen. 872, at 874.) One example of improvements that are considered temporary is a portable building that is not affixed to the land in any way (the one in question having a dirt floor). (42 Comp. Gen. 212, at 214) One Comptroller General decision discussed the nexus between two similar types of improvements, one of which was considered temporary, the other permanent. In that decision, wholly unattached, movable screens or detachable panels that could be removed without injuring or defacing either the panels themselves or the floors, walls, and ceilings of the building were considered temporary. Panels that could be physically removed, but were attached to the building so that removal would most likely cause injury or destruction and so that the cost of removal would outweigh any salvage value were considered permanent. (20 Comp. Gen. 105, at 109, 110) (For consideration here is also the recent enactment of 40 U.S.C. 490(i), which authorizes agencies to install, repair, or replace State or local government owned sidewalks around Federal installations. Such sidewalks as these are often not installed or repaired because the State or local government cannot assess the Federal government for the cost. GSA requested this specific statutory authority because, "under present law, it has no authority to repair or replace sidewalks adjacent to Federal property" since this would be a government improvement to private property. (S. Rept. 811, 89th Cong., 1st Sess.)) In summation of the fourth test, if the Government is to be compensated by the property owner for the value of the improvements, the property owner will receive no useful value from the improvements after Government use ceases, or the improvements are temporary, the test is met. If the test is not met, specific statutory authority to improve private property is required. (See also 47 id. 61, at 64.)

Accordingly, a line-item inserted in the Coast Guard budget to improve private property, in the absence of legislative authority to do so, serves no useful legal purpose. However, the Coast Guard may expend funds to improve private property if the improvement is essential to the accomplishment of a Coast Guard function, task, or mission and the expense is comparatively reasonable and a benefit to the landowner compensates the Government for the improvement, or the improvement is temporary.

Finally, the remainder of the proposal concerns improvements to Federally owned land that is under the control of another agency, the Park Service. As the holding agency, the applicable Park Service appropriations are available for the upkeep and improvement of this property. Use of Coast Guard funds for the purpose without specific statutory authority would most likely be held an improper augmentation of those Park Service appropriations, unless the Coast Guard acquired some control over the property such as a license for its use from the Park Service. (See 37 id. 767, at 772)

G-LGL memo 11104 of 26 November 1980

LEGAL ASPECTS OF MINORITY RECRUITING

The question is whether the Coast Guard can set recruiting goals consistent with the proportion of minorities in the general population and require that basically qualified minorities be given preference until the goal is met.

In October 1968, a Chief Counsel's opinion stated there would be no legal objection "if minimum standards are prescribed for all applicants for enlistment, regardless of race, and quotas are established for Negroes and whites on the basis of an equitable formula, such as the percentage proportion of the Negro race to the total population, or roughly, one in ten." [Chief Counsel's memo CL dtd 22 Oct. 68, Subj: Enlistment of Negro Personnel.] Since that time there have been significant developments in the law. In McDonald v. Santa Fe Trail Transportation Co., 96 S. Ct. 2574 (1976) the Supreme Court said that Title VII of the Civil Rights Act of 1964 as amended (hereinafter Title VII) and 42 U.S.C. 1981 are applicable to racial discrimination against white persons based upon the same standards as would be applicable to discrimination against Negroes. While Title VII does not directly apply to uniformed members of the Coast Guard, 42 U.S.C. 1981 does. Two years later, in Regents of University of California v. Bakke, 98 S.Ct. 2733 (1978), the Court made it clear that the use of "quotas" whereby selection of persons to receive some public benefit is controlled by race is unconstitutional. Of course, the Bakke case is not, technically, a constitutional law decision, because only one member of the majority felt it necessary to reach the constitutional equal protection issue. The other members who joined in the judgment (which simply characterized the use of quotas by the University of California as "unlawful"), apparently felt the case could be decided on the narrower, statutory basis that Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, had been violated. Nevertheless, since a majority of the Court did agree that the protection afforded by Title VI was no greater than that afforded by the Equal Protection Clause of the Fourteenth Amendment, the dicta in the case has significance as an indicator of how the Court would apply constitutional law to racial quotas should the need arise. In his opinion which announced the judgment of the Court, Mr. Justice Powell pointed out that the Court has "never approved preferential classifications in the absence of proven constitutional or statutory violations" and went on to say "preferring members of any one group for no other reason than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." [*id*. at 2755, 2757]. In essence, the *Bakke* case stands for the proposition that favored treatment on the basis of race is generally, but not absolutely, forbidden by the Constitution. It is permissible where there has been a determination that a particular person or group of persons has been the victim of illegal discrimination and favored treatment in limited form is necessary to provide an appropriate remedy.

The uncertainty left by the divided Court in *Bakke* concerning permissible affirmative action was compounded in 1979 when a labor agreement which accorded minorities preference on the basis of race was found to be acceptable to a majority of the Supreme Court. [*United Steelworkers v. Weber*, 99 S. Ct. 2721 (1979).] However, the *Weber* case must be applied with caution because the basis for the decision is a narrow holding. It is only a determination by the Court that a *private* employer and a union may, without violating Title VII, enter into a *voluntary agreement* to provide favorable treatment for certain racial groups in order to eliminate traditional patterns of racial discrimination by that union and employer. No issue as to possible violations of constitutional rights by such practices was decided in the *Weber* case because the acts complained about were those of private parties, as opposed to actions by a governmental unit or, as in *Bakke*, a private body affected with public interest. Another case which has tended to produce uncertainties as to permissible affirmative action is *Fullilove v. Klutznick*, 100 S. Ct. 2758 (1980) which deals with "minority set-asides" in public works employment. That case does not, as suggested in reference (a), stand for the proposition that racial quotas are permissible if they are set by Congress. Instead, the case stands for the proposition that where Congress has enacted a statute providing some favorable treatment for a protected group as a *remedial* measure, based upon the existence of sufficient *evidence* to convince Congress that the chosen remedial action is appropriate, the statute will not be held to be unconstitutional *on its face*. The Court did not decide whether such a statute would be unconstitutional *as applied* because that issue was not presented by the *Fullilove* case. Thus, the cases decided by the Supreme Court since *Bakke* do not depart from the judgment of that case. That is, a selection system which is facially neutral but considers race as one of many factors is presumed to be lawful under the Constitution. [See *Bakke* at 2763.] But, favoritism based upon race or ethnic origin which operates to deprive others of some public benefit is unconstitutional, unless it is directed by competent authority as a remedy for past discrimination.

Based on the foregoing, the best answer I can give to the generalized question presented is that the approach contemplated is inconsistent with the Equal Protection Clause of the Fourteenth Amendment, which is made applicable to the Federal Government through the Due Process Clause of the Fifth Amendment. The use of separate waiting lists and selection lists drawn along lines established on the basis of minority/non-minority would clearly not be facially neutral and it would suggest a conscious decision to discriminate against non-minority applicants. Also, any program adopted in which rigid "quotas" or "goals" were set and persons were selected or rejected purely on the basis of race or ethnic origin would be unconstitutional. On the other hand, a program using race or ethnic origin as only one factor to reach "goals" would be presumed constitutional. Any person rejected by such a program could still attempt to show that the program was in reality operating as a racial quota in violation of his equal protection and due process rights, but a person asserting "reverse discrimination" must show that but for the illegal discrimination he would have been selected. In one very recent case, the Secretary of Labor conceded that the promotion of a black employee was reverse discrimination, but the Court of Appeals for the Ninth Circuit held that because the Secretary had proved by clear and convincing evidence that other applicants had qualifications superior to those of the employee who was not selected, and that even if there had been no discrimination, he still would not have been chosen for the vacancy, the federal employee who was not selected could not recover damages. [*Marotta v. Usery*, 78-1341 (9th Cir., 6 Oct 1980).]

Affirmative action is still an area about which the Supreme Court has not spoken with clarity. A new case, *Minnick v. California Department of Corrections*, expected to be decided by the Court during this term, may provide more specific guidance. Meanwhile, it is recommended that any specific proposal to give preference in recruiting to minority applicants be reviewed by this Office prior to its implementation.

G-LGL memo 1135 of 17 November 1980

THE HOLDING OF CIVIL OFFICE BY ENLISTED PERSONNEL OF THE ARMED FORCES

This is in response to an inquiry concerning prohibitions against the holding of civil office by enlisted personnel of the Armed Forces.

Title 10, United States Code, Section 973(b) prohibits an officer on the active list of the Regular Armed Forces from holding a civil office, whether by election or appointment. The word officer, as used in Section 973, includes a regular commissioned officer appointed under 10 U.S.C. 555(b). However, Section 973(b) is not applicable to enlisted members of an armed Force.

Except for the provision of 10 U.S.C. 974, which restricts the employment of enlisted members in the civilian sector when the employment would interfere with the employment of qualified civilians, there is no statutory prohibition against enlisted personnel holding a civil office. However, the Commandant of the Coast Guard, by regulation, prohibits a member of the Coast Guard from engaging in a civilian occupation that would interfere with the member's performance of Coast Guard duties. Moreover, since the Hatch Act does not apply to the military, the Commandant has, by regulation, restricted the political activity of Coast Guard personnel, both officer and enlisted. In this connection, the Coast Guard prohibits a member from participating in partisan political activity. An enlisted member of the Coast Guard may participate in nonpartisan political activity, and accept a nonpartisan civil office if the duties of the civil office do not interfere with the member's performance of Coast Guard duties.

G-LGL ltr 5730 of 4 December 1980

E. H. Daniels
E. H. DANIELS

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33 CFR 1.07
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33 CFR 1.07-25
429 LB 16

33 CFR 8.3109
429 LB 19

33 CFR Part 25
429 LB 17

33 CFR SubPart 25H
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33 CFR 25.803
429 LB 17

33 CFR 25.805(e)
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33 CFR 153.401 et. seq.
429 LB 11

33 CFR 153.407(a)(4)
429 LB 11

33 CFR 173.27
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40 CFR 140
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46 CFR 25.35-1
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429 LB 11

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429 LB 11

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429 LB 4

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429 LB 1,8,11

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429 LB 11

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429 LB 1,5

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429 LB 26

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429 LB 1

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20 Comp. Gen. 927
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33 Comp. Gen. 318 (1954)
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37 Comp. Gen. 767 at 772
429 LB 21

42 Comp. Gen. 212 at 214
429 LB 21

42 Comp. Gen. 495
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46 Comp. Gen. 25, at 26, 29-31
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51 Comp. Gen. 30 (1971)
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55 Comp. Gen. 872, at 873-874
429 LB 21

18 Comp. Gen. 463
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20 Comp. Gen. 105 at 109-10
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42 Comp. Gen. 480, at 481-485
429 LB 21

43 Comp. Gen. 738
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CORRECTION TO LAW BULLETIN NO. 427

In G-LMI ltr 16781/2 of 2 June 1980 digested at 427 LB 17 an error appears. (The correction of this error does not alter the ultimate decision taken by that letter.) The error involves the lights to be displayed by "boats" now subject to the Federal Boat Safety Act of 1971 (FBSA) that were formerly subject to the Motorboat Act of 1940. The above letter incorrectly indicated that "boats" are governed by the lighting requirements of the applicable rules of the road, not those of the Motorboat Act. However, the requirements specified in 46 CFR 25.05-10(b) continue in force for "boats" falling within the definition of "motorboat" found at 46 CFR 24.10-17 by reason of the saving clause of section 41(e) of the FBSA. An expanded discussion of this issue may be found in G-LMI memo 16752 of 19 December 1978 from which the following excerpt is taken.

"The facts in this case disclose that the petitioner is a Yurok Indian who operates an outboard powered skiff less than sixteen feet in length on the Klamath River in California. Petitioner's vessel is a 'boat' within the meaning of the FBSA in that it is either manufactured or used primarily for non-commercial purposes or alternatively is engaged in carrying six or fewer passengers. Although, section 5 of the FBSA empowers the Secretary to regulate the configuration of navigation lights, to date, no such regulations have been issued pursuant to the FBSA. However, prior to the passage of the FBSA, the vessel in question would have been classified as a 'motorboat' and subject to the terms of the Motorboat Act of 1940, 46 U.S.C. 526, et seq., since it is a 'vessel propelled by machinery and not more than sixty-five feet in length.' The navigation light requirements of the Motorboat Act are contained in 46 U.S.C. 526(b) and restated in regulation in 46 CFR 25.05-10. Although the FBSA repealed the Motorboat Act light requirements with respect to 'boats' as defined under the FBSA, it specifically saved the regulations issued pursuant to the Motorboat Act by providing in 41(e) that:

> Regulations, previously issued under statutory provisions repealed, modified, or amended by this Act continue in effect as though promulgated under the authority of this Act until expressly abrogated, modified, or amended by the Secretary under the regulatory authority of this Act.

Thus, the former Motorboat Act light regulations continue to apply to 'boats' as though the regulations were promulgated under the FBSA. I must conclude that since the regulations are to be construed as FBSA regulations, section 9 of the FBSA carries with it the authority to grant exemptions from the prescribed light requirements."

*Note: With the effective date of the Inland Navigational Rules Act of 1980 (Pub.L. 96-591) the Motorboat Act Lighting Requirement was repealed on all inland waters except the Great Lakes. When the new rules go into effect on the Great Lakes (1 March 1983) the Motorboat Act Lighting Requirements will be repealed on those waters.

NEGLIGENT OPERATION OF A VESSEL

An appeal was taken from the action of the Hearing Officer in assessing total penalties of $1,000 for five violations of 46 U.S.C. 1461(d) (negligent use of five vessels). The alleged violations occurred when the vessels' moorings broke, allowing the vessels, four of which contained oil or gasoline, to drift three miles downstream, thereby endangering both life and property.

On appeal it was contended that the penalties should be dismissed because the Appellant had acted in a prudent and safe manner in that: (1) the floating facility was properly moored to the shoreline; (2) the four barges were properly secured to the floating facility; (3) the excessive depth and flow of the river caused the mooring cable to break; and (4) Appellant's personnel acted swiftly to minimize the damages and risks of the breakaway. In the alternative, it was contended that the penalties should be reduced because, even if the cable was negligently spliced, only one violation of 46 U.S.C. 1461(d) occurred in that: (1) only one mooring cable failed; and (2) the four barges and floating facility remained tied together and thus should be considered a single vessel. The appeal was denied for the reason stated below.

Your contention that your company acted in a prudent and safe manner is not supported by your own submissions or any other evidence in the record. There is substantial evidence in the record to support the Hearing Officer's finding that five vessels broke away from the shore as a result of a negligently spliced headwire. You have presented no information which indicates the cable was properly spliced. Furthermore, the possibility that the four barges may have been properly secured to the floating facility does not alter the fact that the headwire upon which they all relied was negligently spliced.

Although the river may have been flowing higher and faster than normal, there is no evidence in the record which indicates that the conditions were so unexpected as to preclude you from taking the necessary steps to assure the safe mooring of the five vessels. As stated above, there is substantial evidence in the record which shows that the breakaway occurred as a result of a negligently spliced headwire.

The prompt action of your personnel in preventing a more serious accident is noted. However, this does not change the fact that the violations have occurred. I note that the Hearing Officer considered this factor in reducing the original assessment of $500 per violation to $200 per violation. I find that further reduction is not warranted.

Your contention that only one violation of 46 U.S.C. 1461(d) occurred because only one cable broke also lacks merit. You have not challenged the finding that you had a duty to moor each vessel safely. In the present case, four barges were moored to a temporary floating dock, which itself was negligently moored to the shore. Because this cable was negligently spliced, it cannot be said that each of the vessels was safely moored to the shore. Therefore, each of five vessels was being used (i.e., operated; see 46 U.S.C. 1452(4)) in a negligent manner which resulted in five violations of 46 U.S.C. 1461(d). Furthermore, the fact that the vessels remained tied together does not mean they are considered to be a single vessel. The violations occurred when the head wire was negligently spliced, regardless of whether the vessels subsequently remained together or broke apart from each other.

G-LMI ltr 16731/2 of 15 Jan 1981

NEGLIGENT OPERATION OF A VESSEL

An attorney representing the pilot of a vessel appealed the action of a Hearing Officer in asssessing a civil penalty against the pilot for violation of 46 U.S.C. 1461(d) (negligent operation of a vessel; grounding).

On appeal it was contended that:

(1) The Coast Guard lacks jurisdiction under 46 U.S.C. 1461(d) to assess penalties against a pilot acting under his state license;

(2) There was no credible evidence to support the penalty assessment; and

(3) The Hearing Officer did not give due consideration to the reliability of the evidence, and that his decision was not supported by substantial evidence in the record. The appeal was denied for the reasons stated below.

Your jurisdictional argument asserts that [the pilot] in his role as a state pilot, is not a "person" subject to 46 U.S.C. 1461(d), and that [the subject vessel], as a foreign, commercial vessel, is not subject to 46 U.S.C. 1461(d), which you assert applies only to recreational boats.

"Person" is not defined in 46 U.S.C. 1452, and, thus, has its plain meaning. It clearly includes individuals, such as the appellant. Also, there is no provision in the Federal Boat Safety Act (FBSA) exempting state pilots as a class from 46 U.S.C. 1461(d). Soriano v. United States, 494 F.2d 681 (9th Cir. 1974) and Dietz v. Siler, 414 F. Supp. 1105 (E.D. La. 1976) have no application to civil penalty actions under 33 CFR 1.07. Those cases concerned administrative action under 46 U.S.C. 239 and 46 CFR Part 5 to suspend or revoke the federal pilotage licenses of the men involved, not civil penalty action for a violation of 46 U.S.C. 1461(d). The language in Soriano, at page 3, that "nothing in Title 52 of the Revised Statutes (which includes 46 U.S.C. §239) shall be construed to annul or affect the power of the states to regulate such "pilots", does not apply because 46 U.S.C. 1461(d) is not included in Title 52 of the Revised Statutes. Therefore, since Soriano and Dietz have no application in civil penalty proceedings, and since appellant is a "person" not otherwise exempted by the FBSA, he is subject to a civil penalty for violation of 46 U.S.C. 1461(d).

"Vessel" and "boat" are defined in 46 U.S.C. 1452. "Vessel" is defined very broadly and includes "boats", as well as "every description of watercraft . . . used or capable of being used as a means of transportation on the water." 46 U.S.C. 1461(d) expressly applies to the categories of vessels exempted by 46 U.S.C. 1453(c) from some FBSA provisions. One of these categories which is thus made expressly subject to 46 U.S.C. 1461(d) is "foreign vessels temporarily using waters subject to United States jurisdiction." See 46 U.S.C. 1453(c)(1). The subject vessel at the time of the grounding was clearly such a vessel. If there is any doubt on the face of the statute, 46 U.S.C. 1461(d), which I believe there is not, the Senate Report removes it by stating: "Still other provisions, (e.g., the prohibition against negligent operation), pertain to all vessels." Clearly, the vessel in question is a "vessel" within the prohibition of 46 U.S.C. 1461(d). Therefore, your contention that the Coast Guard lacks jurisdiction is without legal merit.

The record clearly supports the fact that the vessel grounded as it passed under the Triborough Bridge and that the channel was clear shortly after the grounding to a depth which would have accommodated the draft of the vessel on 28 January 1979, if it had been properly within the channel. These facts corroborate the statements of the Master and Chief Mate that indicate the vessel was too close to shore.

Your exhibits F and G indicate that the rocky area extended about 50 feet toward the channel from the stone wall. Your client stated immediately after the grounding that the vessel was 75 feet from shore, and, at the hearing, that it was 125 feet from shore. In any event, since he was navigating the vessel when it grounded, his statement is self-serving. The Hearing Officer could properly discount these conflicting and self-serving statements in favor of the statements of the Master and Chief Mate, which were supported by the fact of the grounding and the other evidence. Your assertion that there was no evidence of the violation in the file is erroneous. It was uncontested that the vessel grounded while being navigated by the pilot. This alone places the burden on him of going forward with evidence to rebut the presumption of negligence in grounding cases. The statements of the Master and Chief Master are also evidence and were properly considered under the evidentiary standards set forth in 33 CFR 1.07-55. In the absence of evidence that the Hearing Officer acted arbitrarily, his decision as to the weight given to the evidence will not be disturbed. Therefore, the penalty will not be set aside merely because there were some conflicting statements regarding the distance to shore.

Contrary to your final ground for appeal, I find that the Hearing Officer properly considered the evidence before him, and that there is substantial evidence in the record to support the finding of negligent use of a vessel by your client so as to endanger the property of any person. His decision as to the penalty amount was neither arbitrary nor capricious, and is within the statutory maximum prescribed by 46 U.S.C. 1484(b). Therefore, the $400 penalty assessed is hereby affirmed.

G-LMI ltr 16731/3 of 31 Mar 1981

CARRYING PASSENGERS FOR HIRE

A party appealed from the action of a Hearing Officer in assessing penalties for the following violations of federal safety laws and regulations:

Regulation/Law	Nature of Violation	Assessed Penalty
46 U.S.C. 1461(e)	Carrying passengers for hire without a licensed operator.	$1,000
46 U.S.C. 390c	Carrying passengers on an uninspected vessel.	$1,000
46 U.S.C. 390b (46 CFR 176.35)	Carrying passengers on an international voyage without a "Passenger Ship Safety Certificate."	Warning
46 U.S.C. 526(e)	Having an insufficient number or type of approved personal floatation devices.	$200
46 U.S.C. 526(c)	Not having an operative mechanical sound-producing device.	Warning
46 U.S.C. 1461(d)	Negligent operation of a vessel.	$500

The violations were discovered when the party's vessel was boarded at Key West, Florida. On appeal, it was asserted that the party did not carry passengers for hire, that an operable sound-producing device was aboard, and that the charges relating to overloading his vessel stemmed from the fact that Cuban authorities forcibly required him to carry an excessive number of passengers.

Title 46 U.S.C. 1461(e) prohibits certain vessels from carrying passengers for hire if those vessels are not in the charge of a licensed operator. 46 CFR 24.10-3 defines "carrying passengers for hire" as "the carriage of any person or persons by a vessel for a valuable consideration, whether directly or indirectly flowing to the owner, charterer, operator, agent or any other person interested in the vessel." In this case, the record indicates that you departed Key West on 6 May 1980 with five or six passengers who shared expenses. The Coast Guard has long held that sharing of expenses constitutes valuable consideration flowing to the owner, charterer, operator, agent or any other person interested in the vessel. Therefore, the Hearing Officer's finding that you carried passengers for hire in violation of 46 U.S.C. 1461(e) is supported by substantial evidence in the record.

In this case, the Hearing Officer incorrectly considered that the applicable statute governing penalty size was 46 U.S.C. 390d and that the maximum penalty was $1,000. The correct maximum penalty for this violation is $500, as provided by 46 U.S.C. 1484(b). The Hearing Officer found that the maximum statutory penalty was warranted for this violation. I have reconsidered all the facts of this case and also find that the maximum authorized penalty of $500 is warranted. Therefore, a penalty is hereby assessed for the violation of 46 U.S.C. 1461(e) in the amount of $500.

I find that the violations of 46 U.S.C. 390c and 390b are supported by substantial evidence in the record. You admit that, on the voyage from Mariel to Key West, you carried at least two persons that you intended to transport, who were in addition to the initial five passengers which you carried from Key West. Thus, the record establishes that you intentionally carried more than six "passengers" as that term is defined in 46 U.S.C. 390. These passengers do not fit into the "guest" exemption (46 U.S.C. 390(a)(5)) since the voyage was not exclusively for pleasure. Additionally, on the voyage from Mariel to Key West, you carried more than twelve passengers, thereby subjecting you to 46 CFR 176.35.

The violation of 46 U.S.C. 526(c) is also supported by substantial evidence in the record in that you did not carry a power operated sound-producing device, as required by 46 CFR 25.05.

Although the Hearing Officer's finding of violations of 46 U.S.C. 526(e) and 46 U.S.C. 1461(d) are supported by substantial evidence, the amounts of the penalties were incorrectly assessed and require corrective action. Specifically, the administrative record fails to establish that the Hearing Officer considered the forcible loading defense which you raised. The Hearing Officer, in his 17 September 1980 letter to you, stated that in determining penalty size his sole consideration was safety of life at sea. In cases in which intent is not an element of a violation which may result in assessment of a civil penalty, duress is not an affirmative defense to the charge. However, duress should be considered a factor in mitigation of the civil penalty. See Pollgreen v. Morris, 496 F.Supp. 1042 (S.D.Fla. 1980). In this case, the record does not establish that you intended to carry an excessive number of passengers or that you had knowledge before you reached Mariel that your vessel would be forcibly overloaded. Thus, your arguments on this point are uncontroverted by evidence in the record. Therefore, I have reconsidered the penalties for violations of 46 U.S.C. 526(e) and 46 U.S.C. 1461(d) to correct the Hearing Officer's failure to take this mitigating factor into consideration. In lieu of the monetary penalties assessed for these violations, I hereby determine that the issuance of a letter of warning is appropriate. This letter constitutes your warning on this matter. It will be maintained on file with the Coast Guard and will be considered as establishing a violation by you which will be taken into account in the future if you are found to have committed subsequent violations . . . .

[In his letter to the Hearing Officer concerning the subject civil penalty case, the Commandant's delegate made the following observations:]

The maximum penalty for a violation of 46 U.S.C. 1461(e) is $500, based on 46 U.S.C. 1484(b), rather than $1,000 under 46 U.S.C. 390d, as stated in the preliminary assessment letter. Thus, the penalty assessed for this violation has been set aside and a $500 penalty has been reissued in lieu thereof.

The monetary penalties for violations of 46 U.S.C. 526(e) and 46 U.S.C. 1461(d) have been set aside and warnings have been issued in lieu thereof. In the assessment letter, the Hearing Officer stated that the sole consideration in determining penalty size was safety of life at sea. However, the violator raised the defense of duress in his letter, which is part of the record and which is uncontroverted by any evidence of record. The violator was entitled, as a matter of law, to have considered the defense of duress in evaluating the amount of the penalty to be assessed.

In cases in which intent is not an element of a charged violation which may result in the assessment of a civil penalty, duress is not an affirmative defense to the violation. However, duress is a factor which must be considered in determining of the amount of the civil penalty. See Pollgreen v. Morris, 496 F.Supp. 1042 (S.D.Fla. 1980). Pollgreen concerns governmental seizures of several vessels used in connection with the movement of refugees from Cuba to the United States. In reviewing the events preceeding the seizures, the Court found that it was not until 14 May 1980 that the President imposed a blockade on outgoing vessels and ordered the return of U.S. vessels already at Mariel Harbor. In fact, the vessels seized in Pollgreen received prior clearance from Customs officials to travel to Mariel. The plaintiffs alleged that the seizures violated their Fifth Amendment due process rights, and sought to permanently enjoin the Government from seizing vessels, from seeking to levy fines, and from assessing civil penalties, under 8 U.S.C. §§1321, 1323 and 1324. A preliminary injunction was granted, based on the likelihood of success on the merits by the plaintiffs.

The discussion by the court of the issue of duress and its effect on the assessment of civil penalties is relevant. First, a distinction is made between 8 U.S.C. 1321 and 1323 and 8 U.S.C. 1324. Section 1324(b)(1) provides that a vessel is subject to seizures except when the owner, master or person in charge was not, at the time of the alleged act, a consenting party thereto. The court characterized this statute as being one for which duress is an affirmative defense. However, intent is not a statutory element of the 8 U.S.C. 1321 offense, an offense clearly subject to a civil penalty. In this case "it is logical to assume that duress must be considered as a mitigating factor in assessing damages under those sections." Pollgreen at 1055. In the civil penalty situation, duress then, should be considered in mitigation of the penalty, but it is not a defense to a finding of a violation in a case in which intent is not a statutory element of the offense. Further, the legal principles concerning duress which were espoused in Pollgreen should be applied in the Coast Guard's civil penalty proceedings in the future.

Since duress is normally raised as a defense in criminal proceedings, the elements of duress derive from those cases. Generally, duress excuses criminal conduct where the actor was under a threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. Duress covers the situation in which the coercion had its source in the actions of other human beings. United States v. Bailey, 100 S.Ct. 624, 634 (1980); Pollgreen at 1054.

Applying duress to the Pollgreen case, the court found that the plaintiffs were only proceeding to Cuba to transport relatives or friends, all of whom plaintiffs assumed had valid visas. "Despite these intentions, Plaintiffs were required by armed soldiers of the Cuban Government to take onboard their vessels other Cuban nationals, whether documented or not . . . . Cuban gunboats in fact prevented Plaintiffs from departing Mariel Harbor without bringing back Cuban national . . . ." See also footnote 19.

Though the Court emphasized that its determination was only a preliminary finding, nevertheless, based on the facts presented, it was persuaded that the plaintiffs were likely to prevail on their challenges to the Government's action by reason of duress.

Implicit in the Pollgreen court's conclusions is the finding that the plaintiffs had no knowledge that they would be forcibly loaded in Cuba. On the other hand, if it is shown that the alleged violator traveled to Mariel knowing that he would be force boarded, then his actions would negate the duress defense. If the Government intends to rebut the duress defense the case file must include information concerning knowledge to permit a fair and full review of this issue.

G-LMI ltr 16781/7 of 29 Jan 1981

CARRYING PASSENGERS FOR HIRE

In a recent civil penalty case, a penalty was assessed against the party inter alia for carrying passengers without a licensed operator, in violation of 46 U.S.C. 390b. However, 46 U.S.C. 390b does not require a licensed operator. Rather, it authorizes regulations regarding the manning of vessels subject to 46 U.S.C. 390 et. seq. The applicable regulation, 46 CFR 186.05, provides only that an OCMI shall enter the crew required on the vessel's Certificate of Inspection. Although the vessel was subject to inspection, it did not have a Certificate of Inspection which specified the crew required. Consequently, a violation of 46 U.S.C. 390b was found not to have occurred and the penalty assessed for violation of that particular statute was dismissed.

G-LMI ltr 16781/7 of 3 Feb 1981

CARRYING PASSENGERS FOR HIRE

An interpretation was requested regarding the applicability of 46 U.S.C. 1461(e) and 46 CFR 10.20 to the operation of vessels by a non-profit corporation that teaches sailing to various students. The corporation charges the students a fee which is used to pay for course material and to help defray maintenance of the vessels. Only two vessels are used by the corporation, a 24 foot sloop-rigged fiberglass sailboat equipped with an outboard motor and a 29 foot sloop-rigged fiberglass sailboat equipped with an inboard diesel engine. The person requesting the interpretation argued that the students should not be considered passengers for hire under 46 U.S.C. 1461(e) since all fees are utilized for course materials and boat maintenance and the corporation is not for profit.

Based upon the above facts and description of the vessels, if six or fewer students are carried, the students would be passengers under 46 U.S.C. 1452(5) and a licensed operator would be required under 46 U.S.C. 1461(e). Initially it must be pointed out that the status of the corporation as a non-profit entity has no bearing on the issues involved. The Federal Boat Safety Act of 1972 contains specific provisions concerning applicability (46 U.S.C. 1453) and no exemption is provided for non-profit entities.

The students would be passengers under 46 U.S.C. 1452(5) since they would not qualify under any of the four enumerated exceptions in that section. Additionally, the "passengers for hire" requirement of 46 U.S.C. 1461(e) is satisfied by the payment of the fee for instruction. The carriage of passengers for hire is defined in Coast Guard Regulations (46 CFR 24.10-3, also identical language in other subchapters of 46 CFR) as the carriage of any person or persons by a vessel for a valuable consideration, whether directly or indirectly flowing to the owner, charterer, operator, agent or any other person interested in the vessel. As part of the "instruction" includes taking the students aboard the vessels for practical instruction the corporation must provide a licensed operator for the vessel. The corporation has secured consideration for the carriage of the students and therefore the students have become passengers for hire on board within the meaning of 46 U.S.C. 1461(e).

It should be noted that if more than six students are carried the vessels would be subject to the inspection and manning requirements of 46 U.S.C. 390 et seq.

The person's request for exemption from the licensed operator requirement of 46 U.S.C. 1461(e) was referred to the Office of Boating Safety. Exemption requests are within the purview of that office.

G-LMI ltr 16750 of 25 Jun 1981

CARRYING PASSENGERS FOR HIRE -- DEMISE CHARTER

An appeal was taken from the action of a Hearing Officer in assessing a penalty against a company for carrying more than six passengers on a vessel without a Certificate of Inspection in violation of 46 U.S.C. 390c.

On appeal it was insisted that no violation occurred, since the vessel in question was operating under a bareboat charter at the time of the alleged violation. The appeal was denied for the reasons stated below.

It is uncontested that the vessel was operated without a Certificate of Inspection. "Passenger" is defined at 46 U.S.C. 390(a) and includes all persons onboard except the owner or his representative, the master and crew; employees of the owner; employees of a bareboat charterer; and non-paying guests; all subject to certain conditions not relevant here. Of particular significance in this case is the limitation placed on persons who contribute, directly or indirectly, for their carriage. See 46 CFR 175.10-28.

There is substantial evidence in the record which supports the Hearing Officer's determination that valuable consideration was contributed for the carriage of approximately forty-seven people on or about 8 June 1978. You have taken the position that the vessel's owner is not liable for a violation of 46 U.S.C. 390c on the grounds that an effective demise charter operated to install another company as the owner pro hac vice of the vessel. It is agreed that the existence of a true demise would strongly evidence that the ownership for the duration of the charter had been effectively transferred to the other company. Unless contravened by the associated conduct of the parties, such an agreement might well demonstrate that the subject vessel was not a "passenger carrying vessel" at the time in issue.

This argument, however, is not well taken. The thrust of the numerous court opinions in this area recognize that no single factor is necessarily conclusive in determining the existence of a true demise. The opinions are quite uniform in placing great emphasis on the identification of the party who exercises control and navigational authority over a vessel in deciding whether a demise exists. Similarly, the Coast Guard, when determining whether 46 U.S.C. 390c (or any similar safety law) applies in a given case, must look to the substance rather than the form of the transaction and evaluate all circumstances surrounding a charter transaction, inter alia, the written agreement (if any), conduct of the parties, allocation of liability, fueling and victualling of the vessel, and manning of the vessel. See Guzman v. Pichirilo, 369 U.S. 698 (1962); U.S. v. Shea, 152 U.S. 178 (1874); Reed v. U.S., 78 U.S. 591 (Wall. 1871); Hansen v. E.I. Dupont DeNemours & Co., 33 F.2d 94 (2d Cir. 1929) cert. denied 280 U.S. 589; The R. Lenthan, Jr., 43 F.2d 959 (W.D.N.Y. 1930).

Reviewing the case record, it is clear that if the agreement between the parties did not create a demise charter, the result by implication would be the existence of a situation in which there was a carriage of passengers subject to 46 U.S.C. 390. The totality of the evidence thus must determine whether the transaction in issue was subject to the statute.

Although of some weight, the written agreement is not conclusive in favor of a demise. This is true even though it may employ terms customarily chosen to create a demise. Additionally, the agreement clearly does not reflect the entire transaction between the parties, as evidenced by the failure of the document to reflect the deposit paid by the purported owner *pro hac vice*.

The agreement itself demonstrates that both parties recognized significant strictures on the dominion and control of the "charterer" over the vessel. Beyond the right of approval over choice of skipper and crew, the owner limited decision making authority in navigational matters to the discretion of the approved master. The owner also retained all obligations to provide insurance on the vessel - and limited use of the vessel to certain designated waters. Despite the recitation in the purported charter agreement, it is clear that fueling of the vessel was not the responsibility of the charterer and that no separate billing for fuel charges was made. Also significant is the limited period of the charter and the continuing relationship between the owner and the crew of the vessel. Although these two latter facts in isolation might not be dispositive of the issue posed, they are significant when viewed in the panapoly of circumstances surrounding this charter. In the context of the actual agreement here, only incidental control was available to the charterer.

The evidence of record, both of the agreement and the intent of the parties as manifest by their conduct, supports the conclusion that the vessel was not under the full command, control and navigation of the charterer and that no demise charter existed between the parties. A penalty of $1000, under 46 U.S.C. 390d, for operating a passenger carrying vessel without a Certificate of Inspection as required by 46 U.S.C. 390c is therefore appropriate . . . .

G-LMI ltr 16731/3 of 25 Mar 1981

CARRYING PASSENGERS FOR HIRE -- DEMISE CHARTER

In a case closely analogous to the case reported at 423 LB 5, the Hearing Officer assessed a penalty against the same party for violations of 46 U.S.C. 107 and 390c. On appeal, the finding that the vessel was operated in violation of 46 U.S.C. 390c (carrying more than six passengers without a Certificate of Inspection) was affirmed.

The Hearing Officer incorrectly concluded that the Coast Guard may impose a civil penalty under the authority of 46 U.S.C. 108 for violations of 46 U.S.C. 107 ["No licensed yacht shall engage in any trade, nor in any way violate the revenue laws of the United States; and every such yacht shall comply with the laws in all respects"]. These sections deal with violation of the revenue laws by licensed yachts. They are not documentation statutes *per se*, and are administered by the Commissioner of Customs. The penalty of $200 for violation of 46 U.S.C. 107 was, therefore, dismissed.

G-LMI ltr 16731 of 31 Mar 1981

CARRYING FREIGHT FOR HIRE WITHOUT A VALID CERTIFICATE OF INSPECTION

An appeal was taken from the action of a Hearing Officer in assessing a civil penalty against a company under the authority of 46 U.S.C. 498. The assessment was based on the finding that, in violation of 46 U.S.C. 399, a vessel owned by the company was navigated without a valid Coast Guard Certificate of Inspection (COI) on 75 occasions from 3 September through 9 October 1979.

On appeal it was contended that: (1) there was only a single violation of 46 U.S.C. 399; (2) the prior COI's issued show the company's regard for the requirement for a COI; (3) the lack of an available drydock and the need to support offshore drilling rigs necessitated the violation; and (4) the Coast Guard failed to inspect promptly or to order the vessel to proceed to port. The appeal was denied for the reasons stated below.

The contention that there was only one offense, because the vessel was continuously being navigated while at anchor, moored or underway, has no merit. U.S. v. Monstad, 134 F.2d 986 (9th Cir. 1943) and the cases citing it support a broad scope for the definition of "navigate", "in navigation", and "be navigated." That broad definition includes a fishing barge at anchor in Santa Monica for two years, vessels anchored or moored at both ends of a sea voyage, and vessels being used to transport goods or passengers by water from one place to another. However, these cases deal with statutes having different purposes and they do not support the contention that, because a vessel is continuously being navigated, there can only be one penalty assessed for navigating in violation of vessel safety statutes. A reasonable reading of the federal cases and of 46 U.S.C. §§399 and 404 sustains the position that there should be an assessment of a penalty for each occasion that the vessel carried freight for hire on a voyage in violation of 46 U.S.C. 404, as amended.

Section 404 of title 46 U.S. Code, as amended provides (among other provisions) that:

> "all vessels of above fifteen gross tons carrying freight for hire . . ., propelled by . . . fluid (including diesel fuel as here) shall be subject to all the provisions of this section relating to the inspection of hulls and boilers and requiring engineeers and pilots"

The subject vessel is a 294 gross ton vessel propelled by diesel fuel, and as such is required to be inspected by 46 U.S.C. 404, which is a provision of Title 52 of the Revised Statutes. See 46 U.S.C. 170 (Historical Note). Section 399 of Title 46 U.S. Code provides that:

> "No vessel required to be inspected under the provisions of Title 52 of the Revised Statutes shall be navigated without having onboard an unexpired regular certificate of such inspection or such temporary certificate . . ."

Therefore, by reading 46 U.S.C. §§399 and 404 together, the vessel in question was required to have a valid Certificate of Inspection (COI) before being navigated. It is undisputed that the vessel was operated to and from an offshore platform 75 times in the 31 days from 3 September to 10 October 1979. U.S. v. Monstad and numerous federal cases support that a vessel is "being navigated" when it gets underway on a voyage, as well as when it is moored or anchored during the course of, or at the end of a voyage. Those cases support a penalty for illegally navigating a vessel, whether at anchor, moored, or underway, but do not support an interpretation that there is only one continuous offense for repeatedly operating a vessel, knowing that it lacks a required COI. The position urged, if correct, would encourage repeated offenses in that a vessel, having once carried freight for hire illegally, could then engage in subsequent illegal voyages without incurring any additional penalty.

Looking at 46 U.S.C. 404, the provision which required this vessel to have a COI, it is clear that the essence of the offense is carrying freight for hire, as in this case, without a current COI, as forbidden by 46 U.S.C. 399. It is incumbent on the Coast Guard to show, that on each voyage alleged, freight was being carried while no valid COI was aboard. U.S. v. Reefer King, 90 F.Supp. 236 (D.C. Wash. 1950). In this case, the repeated illegal voyages were established by the log entries of the subject vessel for each voyage to and from the offshore platform. Since the vessel had to load freight on board from shore or the rig, there were periods while it was "in navigation" but not in violation. Each voyage on which the vessel carried freight for hire from shore or the rig, while at anchor or moored to a pier involved a new offense. Therefore, multiple offenses are not only legally possible, they were established by substantial evidence in 75 instances.

The prior COI's issued indicate that the vessel complied with 46 U.S.C. 399 before 3 September 1979, but do not show any special regard for the inspection requirements which might justify a mitigation of the penalty. Lack of a convenient drydock does not justify navigation of a vessel with no valid COI. Rather, it is the owner's responsibility to get the vessel to a drydock. The commercial needs of an offshore rig, likewise, do not justify ignoring ing the safety inspection of a vessel serving that rig.

The asserted failure of the Coast Guard to order the vessel to proceed to port for repairs is irrelevant to the existence of a violation. A vessel must have a valid COI on board regardless of any Coast Guard order, and 46 U.S.C. 399 does not require an order as a prelude to a violation. Also, the inspection for obtaining a replacement COI is scheduled upon a written application by the master, owner, or agent pursuant to 46 CFR 91.25-5. No such request was submitted until 10 October 1979, after these violations occurred. The burden is on the vessel owner, agent or master, not the Coast Guard, to ensure that the inspection is performed.

G-LMI ltr 16700/11 of 30 Mar 1981

OPINION OF LEGALITY ON ISSUANCE OF THREE YEAR CERTIFICATES OF INSPECTION

An opinion was requested regarding the legality of the issuance of three year certificates of inspection. 46 U.S.C. 391a(a) provides for applicability of that section to tank barges in general. Under regulations issued pursuant to 46 U.S.C. 391a(6), 46 CFR 151.04-1(a) requires Certificates of Inspection for Subchapter O tank barges, and 46 CFR 31.01-1(a) requires Certificates of Inspection for Subchapter D tank barges. 46 U.S.C. 391a(8)(E) limits certificates issued under that section to a period not to exceed twenty-four months. As 46 U.S.C. 391a is the statutory authority for our regulations requiring certificates for Subchapter O and D tank barges, those certificates are issued in accordance with the requirements of the statute. Therefore, my opinion is that you are precluded by 46 U.S.C. 391a(8)(E) from issuing Certificates of Inspection for a three-year period.

G-LMI Memo of 5 May 1981

PROPOSED TIME-SHARING ARRANGEMENT FOR A FOREIGN BUILT YACHT -- DOCUMENTATION/INSPECTION AND MANNING/COASTWISE TRADE

In your letter you describe a time-sharing arrangement for the ownership and use of a foreign built yacht. You are interested in receiving assurances that the vessel will not be viewed as carrying passengers for hire or as being in the coastwise trade. At the outset, I must caution that the arrangement you have constructed in your proposal is a novel one. Thus, even if the Coast Guard were to advise that the arrangements did not appear to constitute a carriage of passengers for hire or a use in the coastwise trade, there is no assurance that the courts, banks, insurance companies, or other agencies of government would reach a similar result. Indeed, in dealing with the federal vessel documentation and safety laws, the courts have shown no hesitation in looking to the substance rather than the form of various transactions. Meacham Corp. v. U.S., 207 F.2d 535 (4th Cir. 1953).

Insofar as the first portion of your inquiry, relating to the carriage of passengers for hire is concerned, I note that there are several different aspects of this issue. In addition, there are certain facts which are not disclosed in your letter, such as the vessel's tonnage and means of propulsion, the citizenship of all

all the parties, and the place of organizing the proposed corporations and joint-venture, which could affect the resolution of the various issues involved. Nonetheless, in order to assist you, I will discuss in a general way the issues which appear at this stage.

The first issue arises in the context of documenting the vessel as a yacht under 46 U.S.C. 103 (repealed June 1, 1982 and replace by 46 U.S.C. 651). A vessel so documented is subject to forfeiture if it is not exclusively employed for pleasure or if it is used to carry merchandise or passengers for pay. (Note that the terms "passenger" in 46 U.S.C. 390, "passengers for pay" in 46 U.S.C. 103 statutory and regulatory contexts and are not necessarily synonymous.) As a general principle, it may be said that an owner of a documented pleasure yacht may charter the vessel to another if: (a) the charter is a true bareboat charter and (b) if the charterer uses the vessel exclusively for pleasure. However, in examining this matter it cannot be said with any degree of confidence that a court would view the proposed charter or charters as being truly of a bareboat nature. This is particularly true due to the fact that in the first portion of your description you characterize the ownership interests in the vessel as being held by the persons entitled to use the vessel for one week per year, while in another section you describe the owner as being a corporation formed by the developer. The arrangement is further unclear because you describe the corporation as executing either: (a) a bareboat charter to a joint venture or non-profit corporation; or (b) a number of apparently concurrent bareboat charters to different people who may then form a joint venture or non-profit corporation. In order to find that a charter is a bareboat charter the courts normally look to whether the bareboat relationship is clearly established and whether the charterer has been transferred complete control and command of the vessel's manning, fueling, victualing, repairs and operation. In cases in which purported charterers utilize a master and supplies furnished by the owner, in which major repairs and drydockings remain the responsibility of the owner, or in which certain restrictions are placed on the use of the vessel, there is a substantial risk that the transaction will not be viewed as a bareboat charter. While it may be legally possible to structure bareboat charters for a week at a time, or in some other way which may suit your needs, the realities of similar situations have resulted in many short term "bareboat charters" of pleasure yachts being found to fall short of the intended aim. Thus, I believe there is a substantial risk that the arrangement could fail. In addition, in a joint venture or partnership, all the members under present law must be U.S. citizens to document the vessel. With a large number of "owners" involved, you would have to devise your arrangement quite carefully to ensure that no "owner" could sell his interest to a foreign citizen and subject the vessel to forfeiture. Further, to the extent that you indicate that the developer will retain certain rights in the vessel, the developer may also be considered as having sufficient incidents of ownership to be viewed as an "owner" and, thus, be subject to the U.S. citizenship requirements. As a final note on the documentation issue, I must point out that the vessel, being foreign built, could not be used in the fisheries.

In the area of inspection and manning requirements, the applicability vel non of the relevant laws does not only hinge on whether passengers are being carried for hire.

Rather, the tonnage, the means of propulsion, and other factors can influence the outcome of the inquiry in this area. As in the documentation area, this area of safety regulation is one in which the courts are likely to look to the substance rather than the form of the transaction. Indeed, I am advised that there are presently actions seeking punitive damages being litigated against owners of vessels who had sought to avoid the application of Coast Guard enforced inspection and manning laws by using purported bareboat charters to give the appearance that passengers or cargo were not being carried for hire. Further, while you may require certificates stating that passengers or freight are not being carried for hire, we have seen many instances in which sham certificates have been issued. In such a case, the certificates will not always be adequate to prevent the application of federal laws and the vessel may be subjected either to forfeiture or in rem liability. One of the risks to which you may wish to give some thought involves the effect the certificates would have in an action by injured third parties against the vessel or the developer.

The third and final issue with which you indicate an interest involves the question of whether the vessel would be involved in the coastwise trade. In this area, there is a division of agency responsibility between the Coast Guard and the Customs Service. Under the division, the Coast Guard is responsible for determining whether, based upon the representations made, a vessel is entitled to be documented for the coastwise trade. However, the basic question of whether a particular activity amounts to a use in the coastwise trade is primarily within the competence of the Customs Service. Thus, I suggest that you contact that agency for a more definitive opinion when you have further refined your plans.

In summary, it appears that the arrangement you are preparing is somewhat unique. While there are insufficient facts available for me to determine the extent to which federal laws might apply, other bodies would not necessarily feel bound to follow any Coast Guard opinion on such issues. In particular, a court determining personal injury issues would likely feel free to reach its own conclusions. However, it is my opinion that, based upon the limited outline of the somewhat inchoate arrangement you are devising, there is a substantial risk that the arrangement would not be sufficient to avoid the application of laws applying to vessels used in trade. Similarly, the difficulty of exercising complete control over a large number of "owners" or "joint venturers" raises the risk that certain actions by one or more of the parties could subject the vessel to forfeiture or in rem liability.

G-LMI ltr 16713/16711 of 19 May 1981

MAINTENANCE OF FIRST PURCHASER LISTS BY BOAT MANUFACTURERS

In a recent penalty appeal case, a $500 civil penalty was dismissed. The penalty had been assessed for a boat manufacturer's failure to maintain a first purchaser list, which was allegedly required by 46 U.S.C. 1463(a). However, the broad authority of that statute to require boat manufacturers to establish and maintain records has never been implemented by regulations requiring specific records such as lists of first purchasers.

Also, 46 U.S.C. 1464, which allows first purchaser lists to be used to meet its notification requirement, does not make first purchaser lists mandatory. Therefore, there is neither a specific statutory requirement for first purchaser lists to be maintained, nor regulations requiring such lists, despite the broad statutory authority in 46 U.S.C. 1462(a), which would allow the promulgation of regulations requiring such lists to be maintained.

G-LMI memo 1671/2 of 28 Jan 1981

APPLICATION OF TANK VESSEL ACT TO LIGHTERING VESSELS

The Office of Chief Counsel received a request for an opinion clarifying the applicability of 46 U.S.C. 391a(11) to foreign flag vessels lightering oil or hazardous material outside navigable waters of the United States. 46 U.S.C. 391a(17) clearly requires the delivering vessel to have a Certificate of Compliance in order for the receiving vessel to offload its cargo at a U.S. port. The Certificate of Compliance represents that the vessel is in compliance with all the provisions of 46 U.S.C. 391a, including subsection (11). Thus, the manning requirement of subsection (11) applies to the delivering vessel, in order for the cargo to be offloaded at a U.S. port. In this sense, the obtaining of the Certificate of Compliance is voluntary. The vessel can transfer cargo on the high seas without the Certificate, but the cargo will not be allowed to be offloaded at a U.S. port.

G-LMI memo 16700 of 12 Jan 1981

EXTENSION OF 1974 SOLAS TO TERRITORIES

The Chief Counsel was asked whether SOLAS 74 should be extended to the territories of the U.S. to be effective with respect to those territories. SOLAS 60, Article XIII, contains a "territorial" clause, but SOLAS 74 is silent on the subject.

The commentators agree that the general rule on territorial application is as stated in Article 29 of the Vienna Convention on the Law of the Treaties. "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." Since SOLAS 74 does not address the issue of territorial application, and since an intent to limit its application is not implied, SOLAS 74 applies to the territories of the United States. No extension instrument is required.

G-LMI memo 5050 of 12 Jan 1981

APPLICATION OF THE NATO SOFA AND THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS TO COAST GUARD PERSONNEL IN THE UNITED KINGDOM

The North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA), 4 UST 1792, TIAS 2846, is applicable to Coast Guard personnel assigned to duties in the United Kingdom. Article VIII(5) renders Coast Guard personnel immune from proceedings for the enforcement of judgments in civil matters arising from the performance of their official duties. Criminal jurisdiction over service members is primarily granted to the United States for offenses arising from the performance of official duties which are subject to the laws of the United States. Art. VII(2) and (3).

A limited number of Coast Guard personnel in the United Kingdom are accorded diplomatic status by the host government. These officers' credentials have been accepted by the host government and they are accorded the full immunity from criminal and civil proceedings as provided in Articles 29-36 of the Vienna Convention on Diplomatic Relations, 23 UST 3227, 500 UNTS 95. Coast Guard personnel not on the diplomatic list are currently included on the administrative and technical staff of the mission. Pursuant to Article 37(2) of the Vienna Convention on Diplomatic Relations, these service members enjoy the same immunities as diplomatic list personnel, except that the immunity from the civil and administrative jurisdiction of the host State extends only to acts performed within the course of the staff members' official duties. As is apparent, the immunity afforded by diplomatic or mission staff status is more embracing than the protections accorded a service member by the NATO SOFA. Customary international law would, in general, parallel the protections of the multilateral Vienna Convention.

G-LMI draft 5800 of 8 Jan 1981

REGULATIONS CONCERNING DISCLOSURE OF PASSENGER VESSEL SAFETY STANDARDS AND COUNTRY OF REGISTRY

A problem which has arisen in the interpretation of the regulations deals with whether the term "ocean voyages" includes voyages on water bodies, such as the Mediterranean, Adriatic and Aegean Seas, which are not named oceans. It is my opinion that the legislative intent behind the term was to distinguish between substantial sea voyages and short ferry trips, requiring that the former be subject to the advertising requirements. Compare e.g., the language of the first and second sentence of 46 U.S.C. 362(b).

A further problem in the regulation involves the meaning of the regulatory phrase "vessels that comply with the safety standards set forth in (SOLAS 60, as modified)" and the statutory phrase "vessels meeting the safety standards" of SOLAS 60, as modified. We have had questions arise recently as to whether vessels which are not subject to the full requirements of SOLAS 60, either because they do not engage in "international voyages," as defined in Regulation 2(d), Chapter I, of the SOLAS 60 Regulations, or because they were "existing vessels," as discussed in Regulations I, Chapter II, of the Regulations, are subject to the detailed notification requirements of Part 80. Along these lines, it is my opinion that a vessel which does not meet the substantive standards for "new vessels" under SOLAS 60, as modified, does not "meet" or "comply" with the standards mentioned in 46 U.S.C. 362(b).

G-LMI memo of 17 Feb 1981

COAST GUARD AUXILIARY OPERATIONS IN RELATION TO THE VESSEL BRIDGE-TO-BRIDGE RADIOTELEPHONE ACT (33 U.S.C. 1201-1208)

A legal opinion was requested concerning the applicability of the Vessel Bridge-to-Bridge Radiotelephone Act to Coast Guard Auxiliary vessels 26 feet or over in length, under Coast Guard orders, engaged in towing.

Coast Guard auxiliary vessels over 26 feet in length but under 300 gross tons, when under orders and towing, are not "towing vessels" under 33 U.S.C. 1202(3). Towing by Auxiliary vessels, under search and rescue type conditions, is not considered commercial activity. Consequently, the Auxiliary vessel is not a "commercial vessel engaged in towing . . . ." (33 U.S.C. 1202(3).) The legislative history of the subject Act supports this construction, stating, ". . . the bill is not intended to include such casual towing as, for example, that involved in the use of a yacht club tender to tow race boats to and from a race course or the towing of a becalmed or distressed pleasure boat." 1971 U.S. Code Cong. & Adm. News at 1243.

G-LMI memo 16798 of 16 Mar 1981

APPLICATION OF THE CANNERY TENDER AND FISHERY TENDER EXEMPTIONS IN 46 U.S.C. 88, 367 AND 404

In recent litigation, an issue arose concerning whether the documentation of the defendant's vessels for service in the fisheries automatically qualifies the vessels for the "cannery tender" and "fishery tender" exemptions in the relevant statutes. The defendant employed the circular argument that his vessels are exempt from 46 U.S.C. 88, 367, and 404 because they are documented for fishing, and that they are entitled to be documented for fishing because they are subject to the exemptions in 46 U.S.C. 88, 367, and 404. The defendant also alleged that a documentation officer allowed his vessels to be documented for fishing service.

The first issue in this case involves the interaction, if any, of the documentation laws with the loadline, manning, and inspection laws. The vessel documentation laws and the laws relating to inspection and manning of vessels are based on separate and distinct legislation. Further, the legislative purposes in enacting these different pieces of legislation are not necessarily the same. Thus, a vessel will qualify for documentation in the fisheries and for the exemptions from 46 U.S.C. 88, 367 and 404 only if it meets the requirements of each set of laws. The mere qualification for one does not lead automatically to the other. Further, the fact of documentation for service in the fisheries does not, of itself, necessarily represent any governmental determination since it is normally based on the representations of the owner as to the vessel's use.

The question of whether the vessels are entitled to exemption from 46 U.S.C. 367 and 404 depends on whether they are "cannery tender or fishery tender vessels of not more than five hundred gross tons used in the salmon or crab fisheries of the States of Oregon, Washington, and Alaska which are engaged exclusively in (1) the carriage of cargo to or from vessels in the fishery or a facility used or to be used in the processing or assembling of fishery products, or (2) the transportation of cannery or fishing personnel to or from operating locations . . . ." While the language of the exemption from 46 U.S.C. 88(b) differs slightly, the legislative history of the exemption indicates that the congressional intent was to address the same vessels as those exempt from 46 U.S.C. 367 and 404. The statute creating the exemptions for tender vessels in question was P.L. 90-397, enacted in 1968. Prior to 1968, fishing vessels were not subject to certain inspection laws. The Act of June 20, 1936, Chapter 628, specifically provided "that this Act shall not apply to any vessel engaged in fishing, oystering, clamming, crabbing, or any other branch of the fishery or kelp or sponge industry." However, in 1968, the Coast Guard, which had previously treated cannery and fishery tender vessels as also being entitled to the exemptions, changed its policy and sought to apply the loadline, manning, and inspection laws to these tenders. In reaction to this, Congress passed P.L. 90-397 to allow tenders to be treated the same as fishing vessels. The history behind this change is instructive in determining whether the vessels presently involved in litigation with us are "cannery tender" or "fishery tender" vessels within the meaning of P.L. 90-397. House Report No. 1399, dated May 21, 1968, indicates that the vessels which are cannery or fishery tender vessels are those which are:

1) "Auxiliary vessels used in connection with the fishing industry";
2) "Used for transportation of fishery gear and fuel in connection with catching and canning of fish;
3) Only capable of being "used for relatively short periods each year in connection with fishing runs; and
4) Limited by "economic and physical conditions" to the tending of fishing and cannery vessels and facilities. (1968) U.S. Code Cong. & Adm. News 2598.

In addition, as the express statutory language points out, only those vessels "engaged exclusively" in this function are entitled to this exemption. This was included because Congress desired to exempt that limited number of vessels which only operated for a short period each year, during fishing runs, for which it would be uneconomical to comply with the safety laws. The facts in the case presently being litigated show that the vessels were being used to haul cargo, such as televisions, liquor, and consumer goods, to Alaska for sale by commercial retail stores to the general public. While, in some cases, the vessels may have hauled cargo or fuel for fishing or cannery vessels and facilities, it is clear that they were not so engaged exclusively.

Further, the above-mentioned factors, indicating the types of vessels Congress intended to exempt, are clearly not operative here. These boats are used for hauling general cargo and their operations are not limited to the time when a fish run is occurring. Thus, the economic rationales for the Congressional finding that it was economically unfeasible to bring certain vessels into compliance with safety laws are inapplicable to the vessels presently before the court.

The issues discussed alas represent our position in the U.S. v. Western Pioneer Inc. case, No. A79-301 Civ. (D.Alaska Jul. 15, 1982). In his opinion, the judge upheld, inter alia, the penalties arising from the 46 U.S.C. 367 and 404 violations, but dismissed the penalties arising from the 46 U.S.C. 88 violation based on the plain language of the loadline statute and the fact that no decision was made on whether the vessels were tender vessels apart from the exclusive carriage provisions of 46 U.S.C. 367 and 404. The remaining penalties of the case have been appealed by the Sorianos before the Ninth circuit. The Coast Guard will not cross-appeal the 46 U.S.C. 88 violation dismissal.

G-LMI memo of 19 May 1981

CIVIL PENALTY PROCEDURES -- CONDITIONAL MITIGATION OF PROPOSED PENALTIES IS IMPROPER

In a recent penalty case, the Hearing Officer assessed the maximum allowable civil penalties for a number of violations of statutes and regulations. The total amount assessed was $26,800. In addition, the assessment letter provided for a conditional mitigation of certain of the penalties, such that the total assessment as mitigated was $3,400.

The Hearing Officer's findings as to liability under each of the statutes and regulations cited has been upheld. However, for the reasons stated below, the assessment which has been sustained has been the mitigated amount in each instance where the conditional mitigation applied. In view of the procedural difficulties involved, the use of conditional mitigation should be avoided.

The assessment letter set forth two conditions which were required to be met in order to have the penalty reduced to the mitigated amount. First, the vessel owned by the appellant was required to be brought into compliance "before any further operation." Second, the penalties as mitigated were required to be paid within 30 days of appellant's receipt of the assessment letter. Looking first to the second of these two conditions, the use of such a condition should not be used in any form. The effect of lowering a penalty assessment if pre-appeal payment is made is to require a party found liable to buy an appeal. The right to an administrative appeal is accorded by 33 CFR 1.07-65 and 70. This right should not be abridged by requiring a person to pay a greater penalty for making an appeal. With respect to the first condition, there is no way, consistent with established procedures, by which such a condition may be enforced. Once a Hearing Officer has assessed a penalty, the liable party is entitled to appeal that assessment. On appeal there is no forum available to determine whether the condition was in fact complied with.

In the present case there is nothing in the record which indicates that the vessel was operated subsequently to the assessment. Accordingly, even though there is no evidence to show that the vessel was brought into compliance in any respect, it is impossible to determine whether the condition was in fact met.

However, the objection to the use of conditions of this sort runs deeper than the particular language of the condition used in this case. When a Hearing Officer conditions the penalty assessment amount upon the performance of some act by the party charged, in effect there has been no assessment made. Under the civil penalty procedures set out in 33 CFR 1.07 the role of finding the facts applicable to a specific violation allegation is assigned to the Hearing Officer. The facts which must be found include, in appropriate cases, those pertaining to post-violation remedial action. The findings respecting these facts, as others, are subject to the right of the liable party to be heard prior to their determination and to appeal them thereafter. This precludes the assessment of civil penalties which are subject to mitigation based upon events the relevant facts of which have not been determined by the Hearing Officer.

The foregoing should not be taken to say that remedial action by a liable party is to be considered by a Hearing Officer. Under certain statutes, it is quite proper for a Hearing Officer to do so. In such a case the Hearing Officer may defer the determination of the penalty amount for a specified period of time, informing the liable party that any evidence concerning remedial measures taken, if received within that period, will be considered in mitigation at the time the amount is determined. The final assessment of the Hearing Officer in the case, including the consideration given to the mitigatory evidence, will be subject to appeal.

G-LMI ltr 16781/2 of 12 Jan 1981

CIVIL PENALTY PROCEDURES -- HEARING OFFICER'S DISCRETION TO ASSESS A PENALTY WHEN A PARTY'S COUNSEL FAILS TO ATTEND A HEARING

An appeal was taken from the action of the Hearing Officer in assessing civil penalties for violations of the following federal regulations . . . .

On appeal, you do not deny that the violations occurred. Rather, you argue that the Hearing Officer abused his discretion in proceeding with the case after you failed to attend a scheduled hearing. You also assert that the penalty should have been assessed in a lesser amount and against the charterer of the vessel instead of the shipowner.

I have reviewed the record in this case and find that the Hearing Officer did not abuse his discretion in proceeding with the case and refusing to reopen after you failed to attend the hearing on 4 September 1980. The material of record indicates that your client was charged with five violations of the federal regulations concerning the safe transportation of hazardous materials, as listed above. Your client was given notice of the initiation of administrative civil penalty proceedings and of the opportunity to request a hearing or to provide written material and arguments in lieu of a hearing. On 6 June 1980 you requested a hearing and were advised that one had been scheduled for 25 June. At your request the hearing was rescheduled for 10:00 a.m. on 22 July, but you failed to attend the hearing. However, at 2:00 p.m. that day you contacted the Hearing Officer and requested that the hearing be rescheduled. The request was granted and another hearing was scheduled for 10:00 a.m. on 4 September. Again you failed to attend the hearing. On 5 September, having received no word from you, the Hearing Officer proceeded upon the basis of the facts then available and assessed a total penalty of $5,000. You were advised of this result and responded to the Hearing Officer, in a letter dated 23 September, with a request that the case be reopened. By way of excuse, you alleged that you were attending a pretrial conference in federal district court; that the conference began twenty minutes late; and that you were "rather far down the list" behind several other lengthy matters. Upon all the facts presented, I find your failure to attend the September 4 hearing, after a prior failure to attend a hearing in the case, coupled with your failure to contact the Hearing Officer for nearly three weeks after your absence and after a penalty had been assessed, amounts to an inexcusable breach of the most basic standards of conduct and courtesy expected of members of the legal profession. Your scheduling of a pretrial conference at 9:00 a.m., expecting that it and all the other matters preceding it would be concluded in time for you to attend a hearing at another location at 10:00 a.m., demonstrates a casual attitude towards the administration of justice and the representation of your client. This conclusion is further strengthened by your failure to contact the Hearing Officer or to offer any excuses until nineteen days later, after the Hearing Officer had written to you.

The rules defining the situations in which hearings are rescheduled or reopened are specified in 33 CFR 1.07-25 and 80. I find that the Hearing Officer acted both reasonably and leniently in rescheduling the hearings set for 25 June and 22 July, particularly in light of your failure to attend the 22 July hearing and the untimeliness of your request for rescheduling. His refusal to condone your further dilatory conduct can in no way be considered an abuse of discretion. While it is unfortunate that your conduct has resulted in prejudicing your client's presentation of any defenses he may have, this is now a matter to resolved between you and your client. Further, it appears that the degree of any potential prejudice is slight since you, in your letter of 23 September, seem to admit the existence of the charged discrepancies and to be more interested in reducing the penalty size than in presenting any affirmative defense. In this case, however, faced with maximum statutory penalties totalling $50,000, the Hearing Officer only assessed a total penalty of $5,000. In addition, your request for reopening does not comply with the applicable regulations, 33 CFR 1.07-80(b) . . . .

On appeal, you characterize the penalty as excessive. You also seek to indicate that the penalty should have more appropriately been assessed against another party. However, 33 CFR 1.07-70 contains the general rules describing those matters which may be considered upon appeal, namely: (a) those properly raised before the Hearing officer; and (b) jurisdictional issues. Thus, in this case, having failed to properly present any issues before the Hearing Officer, the only issues which may be considered are jurisdictional ones and ones dealing with a denial of a petition to reopen (see 33 CFR 1.07-80(f)). Neither your appeal nor my review of the record raises any indication of jurisdictional defects; the question concerning reopening has already been answered.

G-LMI ltr 16600/7 of 20 May 1981

CIVIL PENALTY PROCEDURES -- NOTICE AND OPPORTUNITY TO RESPOND

Subject case is remanded because the record does not show that the party was given the opportunity to review all evidence in the record. All evidence in the record must be made available to the party in order to assess a civil penalty under the FWPCA. Independent Bulk Transport v. United States, 394 F.Supp. 1319 (S.D.N.Y. 1975). The Commanding Officer of the Marine Safety Office in question sent the Hearing Officer two letters and a number of photographs concerning the two discharges at issue in the present case. There is not indication in the record that Appellant was given the opportunity to examine the additional evidence. These letters do not indicate that copies were sent to Appellant. The Hearing officer's notes do not state that Appellant was provided the opportunity to examine the entire case file at the hearing. Appellant did not respond to the matters raised in these letters in their subsequent correspondence. Because the record indicates that the Hearing Officer may have assessed a penalty without providing all evidence to the party, the case must be remanded.

If the Hearing Officer made the additional evidence available to Appellant at or before the hearing in this particular case, he should indicate so in the record. He must also inform Appellant of his action to give them the opportunity to respond to this addition to the record. If the additional evidence was not made available, the Hearing Officer must do so now and give Appellant the opportunity to request a hearing or submit written evidence in regard to any new issues raised by the Marine Safety Office's letters and photographs.

In order to render a decision on appeal, the record must indicate what issues were properly raised before the Hearing Officer, and what the Hearing Officer found in regard to these issues. See 33 CFR 1.07; Marine Safety Manual, 13-1-05. In the present case, however, the Hearing Officer's hearing notes dated 19 August 1980 do not reflect all the points raised in Appellant's closing statement dated 22 August 1980. Therefore, it is not clear from the record which of these points were properly raised before the Hearing Officer. Further, it is not clear what the Hearing Officer found, as well as the basis for his findings, in regard to the points raised.

G-LMI ltr 16460/8 of 30 Jun 1981

CIVIL PENALTY PROCEDURES -- NOTICE AND OPPORTUNITY TO RESPOND

A person was charged with violating, inter alia, 46 U.S.C. 1461(d) (negligent use of a vessel) and 33 CFR 175.15 (personal flotation devices required). The penalty assessed for violation of

46 U.S.C. 1461(d) was dismissed because the Hearing Officer considered evidence not made available to the party. The warning issued for violation of 33 CFR 175.15 was dismissed for lack of substantial evidence.

The Hearing Officer must provide the party with the opportunity to examine all evidence being considered in the assessment of a penalty. In her assessment letter of 18 November 1980, the Hearing Officer stated that she had considered additional statements made by the boarding officer in her determination of a violation of 46 U.S.C. 1461(d). There is no indication that the party was provided this evidence prior to the penalty assessment and offered the right to respond to these statements.

In order to find a violation of 33 CFR 175.15, there must be substantial evidence in the record that the required number of personal floatation devices were not on board the vessel. In her assessment letter, the Hearing Officer found that there was a sufficient number of PFDs on board, but she issued a warning nonetheless. In the absence of a violation, a warning may not be issued.

G-LMI ltr 16781/12 of 29 Jun 1981

CIVIL PENALTY PROCEDURES -- INSUFFICIENCY OF EVIDENCE

The penalty assessed for violation of 46 CFR 25.30, insufficient serviceable fire extinguishers onboard, in a recent case was dismissed on the basis of insufficient evidence in the file.

The first discrepancy is in the charge itself. It appears that the specific regulation charged as being violated is 46 CFR 25.30-10(g)(1) which should have been identified. However, this is a harmless error as the violator knew what he was being charged with. More importantly, the Hearing Officer's finding must be based on evidence in the file. Evidence to support a violation of 46 CFR 25.30-10(g)(1) must include the date on the tag. The Boarding Officer's job is not to determine whether a violation exists, but merely to set out evidence that a violation exists. The determination that there was a violation is made by the Hearing Officer based upon evidence provided by the Boarding Officer. The words "Fire Ext. Out of Date" on the Report of Boarding are inadequate to find that more than "6 months have elapsed since last weight check ashore". Accordingly, this charge was dismissed.

G-LMI ltr 16731/8 of 29 Jun 1981

CIVIL PENALTY PROCEDURES -- HEARING OFFICER'S DENIAL OF REQUEST TO TRANSFER LOCATION OF HEARING

A party appealed from the decision of the Hearing Officer, Fifth Coast Guard District, denying a request to hold a hearing in Baltimore in connection with alleged violations of 46 U.S.C. 1461(d) and 33 U.S.C. 209. The party's counsel contended that requiring his counsel to travel from Baltimore to Portsmouth, Virginia to appear at a hearing involves such unnecessary expense and convenience as to violate due process.

Due process in civil penalty cases requires notice and opportunity to be heard. These elements are provided for in the regulations governing the Coast Guard's administrative civil penalty procedures, 33 CFR 1.07. Under these regulations, the offender is given ample opportunity to examine all government evidence which is being considered against him and to present his side of the case in person or by written submissions and to produce witnesses and evidence on his behalf.

There is no general constitutional, statutory or regulatory requirement that the hearing be held at the location most convenient to the alleged violator. Rather, hearings are normally held at the office of the Hearing Officer. The decision to hold the hearing elsewhere is at the discretion of the Hearing Officer. 33 CFR 1.07-45. Your submissions of 17 January 1980 and 9 April 1980 fail to demonstrate that the Hearing Officer abused his discretion in denying your request. The fact that the party may be inconvenienced and may incur some additional expense is not sufficient, per se, to establish that the Hearing Officer abused his discretion or denied the party due process. Furthermore, you have not even demonstrated the need, which you assert, to conduct the hearing in Baltimore by reason of its relative proximity to the incident which resulted in the alleged violation. For these reasons, the decision of the Hearing Officer is affirmed.

G-LMI ltr 16731/5 of 29 Jun 1981

CIVIL PENALTY PROCEDURES

The final assessment letter in this case fails to make a finding that any specific violations occurred and fails to disclose the bases for the decisions of the Hearing Officer. In order to provide an opportunity for a full and fair review of a penalty decision, the appellant is entitled to know the true bases for the decision to be reviewed. See United States v. Independent Bulk Transport, Inc., 384 F.Supp. 1319 (S.D.N.Y. 1975)

There is no evidence in the file of the following violations:

46 U.S.C. 1466, operating an unregistered vessel; and
46 U.S.C. 1469, having no valid certificate of numbers on board.

There is no indication in the Report of Boarding that the official number of the vessel had expired. Therefore, there is no evidence that an "undocumented" vessel is unnumbered (46 U.S.C. 1466). There is no evidence that there was no valid certificate of numbers (46 U.S.C. 1469). The Report of Boarding does allege, for violation #54, that the number was improperly displayed, which should have been charged as a violation of 46 U.S.C. 1470, if the file contained sufficient evidence to do so. The Appellant must be given the opportunity to respond to this violation, should you decide to so charge him.

The finding of violation of 33 CFR 159 for having no marine sanitation device is unsupported by substantial evidence in the file. It appears that the record may give rise to a charge of having an inoperable marine sanitation device, since the Report of Boarding states that the vessel was equipped with a Type I MSD but that the overboard discharge was not treated. It should be remembered that "inoperable" means that the MSD is discharging an effluent which is in excess of that allowed under 33 CFR 159. In view of the different elements of the charges of having no MSD and having an inoperable one, it cannot be said that the alleged violator has had adequate notice of, and an opportunity for a hearing on, a charge of having an inoperable MSD. Thus, the charge is hereby dismissed.

The maximum penalty for a violation of 46 U.S.C. 1461(e) is $500, based on 46 U.S.C. 1484(b), rather than $1,000 under 46 U.S.C. 390d, as stated in the preliminary assessment letter. There is evidence that, on the voyage from Key West to Mariel, the vessel was operated in violation of 46 U.S.C. 1461(e). The penalty amount should be reassessed accordingly.

Title 46 U.S.C. 390c prohibits the carrying of passengers on an uninspected vessel subject to the Act. "Passengers for hire" and "passengers" are terms of art used in 46 U.S.C. 404 and 1461(e), and in 46 U.S.C. 390, and which have different meanings. While a passenger for hire will normally be a "passenger" within the meaning of 46 U.S.C. 390, the nature of violation should be correctly described.

When the charged shortage of life preservers allegedly occurred, the vessel was not subject to 33 CFR 175. The controlling statutes were either 46 U.S.C. 390b (33 CFR 180.25) or 46 U.S.C. 526(e). Therefore, the penalty assessed for violation of 33 CFR 175 is dismissed.

The final assessment letter and the case file do not specify the amounts assessed for each violation. Upon completion of the proceedings on remand, the penalties should be assessed for those charges which have been found proven, taking into account the comments noted above. The record should indicate the amount actually assessed for each violation. For the charges for which the record supports the findings of violations, the penalty amounts must also be reassessed.

G-LMI ltr 16781/7 of 3 Feb 1981

OIL SPILL SAMPLE ANALYSIS

The Commandant has approved procedures concerning the furnishing to Hearing Officers and parties by the Central Oil Identification Laboratory (COIL) of oil sample analysis documentation in general and original tracings from analysis instrumentation in particular. It was determined that there was a need to establish regularized procedures on this matter. The following paragraphs contain these procedures, which are to be used in the future.

In cases in which oil sample analyses results are required by the Hearing Officer in making a determination as to whether a particular vessel or facility was the source of a discharge of oil, original instrumentation tracings need only be provided when requested by the Hearing Officer or the District Program Manager. However, in every case where such analyses are used for this purpose, the Hearing Officer must consider not only the analyst's report but the documents or copies of the documents upon which the analyst based the conclusions contained in the report. Accordingly, copies of instrument tracings and other documentary material which reasonably may be expected to be useful to the Hearing Officer in making the source identification determination, together with copies of documentation demonstrating custody control of the oil samples, should accompany the analyst's report under cover of a transmittal letter identifying each of the documents (or copies of documents) being transmitted.

In cases in which a party charged specifically requests access to original tracings from analysis instrumentation, a Hearing Officer may find that reasonable access to those documents should be provided. In cases of this sort, administrative convenience (operational, financial, or both) to the Coast Guard might preclude bringing laboratory personnel to the hearing with the tracings. Conversely, it might be unreasonable to require the party charged, or anyone acting on that party's behalf, to visit the laboratory for the purpose of examining the tracings. Should the Hearing Officer find that such circumstances pertain, that officer may allow the party charged, or one acting on that party's behalf, to examine the original tracings in the Hearing Officer's office (or, where a Hearing Officer finds it reasonable to do so, at the offices of a Coast Guard unit near to (the requesting party) at a mutually convenient time. In such a case the Hearing officer (and, where a unit near to the requesting party is used, the appropriate personnel of that unit) would retain full custody and control over the original tracings prior to, during, and after the examination keeping in mind the provisions of 33 CFR 1.07-30.

When the Hearing Officer requests COIL to transmit the tracings for that purpose, the tracings should be sent by Certified Mail - Return Receipt Requested to the Hearing Officer. A custody control sheet should be transmitted with the tracings. Entries should be made on the sheet by each person who deposits the tracings with the Postal Service, each person who received them from the Postal Service, and each person who takes custody of them between their receipt from and deposit with the Postal Service. The entries should include the person's name, the date, and where relevant, the postal certificate number.

In cases where the tracings are to be examined at a Coast Guard unit rather than at the office of the Hearing Officer, the Hearing Officer should send them to that unit by Certified Mail - Return Receipt Requested. In such a case, unit personnel having custody over the tracings must be present during their examination. When the examination has been completed at the unit, the tracings should be returned to the Hearing Officer by Certified Mail - Return Receipt Requested.

After the tracings have been examined, the Hearing Officer will determine whether the originals are necessary to his decision as to the liability of the party charged. Should that officer so determine, the original tracings must be included in the case file. In such a circumstance, if the case is appealed to the Commandant, the file should accordingly be forwarded by Certified Mail - Return Receipt Requested. Upon receipt, Commandant (G-LMI), will retain custody over the file until the decision on appeal has been issued. Following the issuance of that decision, the file will be returned by Certified Mail - Return Receipt Requested to the Hearing Officer.

If, after the original tracings have been examined, the Hearing Officer determines that they are not required for that officer's decision in the case, these tracings should be returned to the COIL by Certified Mail - Return Receipt Requested. Where they have been included in the case file, original tracings should be returned to the COIL in a similar manner when payment of the assessed penalty is made in the case, or when the case is closed for any other reason.

In some cases, it may be appropriate for the Hearing Officer to make the COIL analyst available to a charged party. The means which might be employed for this purpose include the personal appearance of the analyst during the hearing, a visit by the requesting party or one acting on his behalf at the COIL offices, a telephonic communication between the requesting party and the analyst, and the submission of written questions to the analyst by the requesting party. This should not be taken to preclude other means which a Hearing Officer might find to be reasonable in the circumstances pertaining.

Should a requesting party desire to obtain the personal appearance of the COIL analyst, attention should be given to the provisions of 33 CFR 1.07-50. Specifically, the request must be in writing and state:

(a) Why a written statement (or written answer to questions or other means other than personal appearance) would be inadequate;
(b) The issue or issues to which the testimony would be relevant; and
(c) The substance of the expected testimony.

In reviewing this written request, the Hearing Officer will determine whether the personal appearance (as distinguished from other means of providing access) of the COIL analyst may materially aid in the decision on the case.

Upon making a determination, the Hearing Officer should communicate with the COIL office to explore the alternatives of (1) providing the COIL analyst at the office of the Hearing Officer, or (2) transferring the hearing to COIL offices. (In either alternative, all costs of the requesting party must be borne by that party, while the cost of Coast Guard personnel travel will be borne by the Coast Guard.) Should neither alternative be feasible the Hearing Officer should provide the requesting party with an opportunity to obtain access to the analyst by a means other than personal appearance.

If the requesting party refuses any method other than person appearance, the Hearing Officer considering all relevant information in the record, must determine whether the failure to provide the personal appearance of the COIL analyst will have the effect of denying the requesting party an opportunity to be heard in the case. If the determination is that the fundamental right to be heard will not be abridged by such a failure, the Hearing Officer will proceed with the case on the basis of the evidence in the record. However if the Hearing Officer finds that such a right will be abridged, the Hearing Officer should dismiss the case.

Two points should be kept in mind in connection with the matter discussed in the foregoing paragraphs. First, without regard to the method employed, a record should be made of the questions asked and answers given, and inserted into the case file. Second, the questions posed to the COIL analyst should be limited to matters falling within the knowledge of the analyst and the scope of the case. COIL analysts should decline to answer questions which exceed that knowledge and scope.

G-LMI memo 16460 of 26 Jan 1981

OIL SPILL SAMPLE ANALYSIS

The penalty assessed in this case was appealed and is hereby dismissed for the reasons stated below.

Evidence derived from oil sample analysis performed by a contracted laboratory constituted the major basis for the Hearing Officer's finding that the vessel discharged the oil in question. The only other terms of evidence bearing upon the discharges source identification issue were the oil stain on the hull of the vessel and the presence of the spilled oil in its vicinity. Taken separately, or in toto, these items are insufficient to support the stated finding of the Hearing Officer.

Regardless of the oil sample analysis method employed it is essential that all possible sources be sampled. Thus all possible sources principle applies to the issue of any oil sample analysis system. It is recognized that the FOIL Manual, promulgated by COMDTINST M 5260.2, 26 April 1976, was issued after the assessment was made in this case. However, the principle involved is crucial to the use of oil sample analysis as evidence.

In the subject case, the Investigating Officer's report states that "the team checked up river but was not able to find any evidence as to where the oil had originated." This is the only statement bearing upon the question of potential alternative sources, but does not answer the question as to whether such sources did or did not exist. Consequently, there is no basis in the record upon which the Hearing Officer could determine the degree to which the "all possible sources" principle was followed in the case. Consequently the results of the oil sample analysis made may not be used to support the discharge source finding of the Hearing Officer.

Since the probative value of the oil stain evidence is limited by statements indicating that it did not reach the surface of the water, the only evidence tending to support the discharge source finding was the presence of the discharged oil in the vicinity of the vessel. (Note that no evidence in the record indicates that the vessel's draft was reduced during the time in question, a fact that could have increased the substantiality of the oil stain evidence significantly.)

Finally, proximity alone, absent evidence tending to exclude alternative sources, due to its highly ambiguous nature is not sufficient to support the Hearing Officer's finding that the vessel discharged the oil in this case.

G-LMI ltr 16460/8 of 3 Feb 1981

OIL SPILL SAMPLE ANALYSIS

In the subject case there appears to be no question as to the basis for the Hearing Officer's finding on the stated factual issue (the discharge source identification). The Hearing Officer's correspondence respecting the issue concentrates exclusively on the analyses of the oil samples performed by the contract laboratory. Furthermore, the Investigating Officer's report bases its conclusion on the issue solely upon one of these analyses. Consequently, it must be assumed that the only bases for the Hearing Officer's finding were the two oil sample analyses performed by the contract laboratory.

Obviously the party against whom the penalty was assessed made the same assumptions for it placed the reliability of the analysis in issue. By 33 CFR 1.07-55(d) the Hearing Officer must consider the reliability of the evidence before him. It is recognized that 33 CFR 1.07-55(d) was promulgated after the assessment was made in this case. However, inherent in the function of the Hearing Officer is the consideration of the reliability of the evidence presented in a case, especially when the evidence in question constitutes the sole basis for the critical finding of fact.

Recently the Chief Counsel set forth three factors which should be taken into account in considering the reliability of oil sample analyses:

(a) the degree to which the performance of the test complied with the controlling standards applicable to it;
(b) the number, type, and results of the tests which were performed; and
(c) the level of competence of the personnel performing the tests.

The record in the subject case contains evidence respecting the second of the foregoing factors. The Hearing Officer clearly took that factor into account. However, there is nothing in the record which specifically demonstrates or from which an implication may be drawn that the other two factors or any others were considered by the Hearing Officer. (The presumption of regularity discussed in the Chief Counsel's memorandum of 22 October 1980 relative to the Central Oil Identification Laboratory analyses does not apply to those performed by contracted laboratories).

In sum, I note that the sole evidentiary bases for the Hearing Officer's finding as to the identity of the vessel from which the oil was discharged in the subject case were the oil sample analyses. Since the reliability of these analyses were placed in issue by the party against which the penalty was assessed, the record must demonstrate that the reliability was adequately considered by the Hearing Officer. I find that the record, viewed in its entirety, does not support a conclusion that adequate consideration was given to the reliability of the analyses. Furthermore, since the record does not include any evidence bearing upon the reliability of the analyses, except that noted in the foregoing paragraph, there is no basis upon which such a consideration may be made. Consequently, the analyses are insufficient to support the stated finding of the Hearing Officer and the case must be dismissed.

G-LMI ltr 16460/8 of 25 Mar 1981

FWPCA PENALTY CASE --- INSUFFICIENCY OF EVIDENCE

This case is hereby dismissed. My review indicates that the evidence in the file is insufficient to support the finding that the subject vessel was the source of the discharge. Based on the record, it appears that the Hearing Officer's finding was based on an observation of the investigating officer that the vessel's bilge was two thirds full of bilge water and had fresh oil stains along the sides approximately 3 inches higher than the bilge fluid level. This is insufficient by itself to support the finding that the vessel discharged oil into the water. While I note that oil samples were taken from the vessel in question, from the waterway and from another vessel in the vicinity, the record contains no indication that the samples were ever analyzed.

G-LMI ltr 16460/8 of 25 Mar 1981

FWPCA PENALTY CASE --- MASTER'S REFUSAL TO ACCEPT FINANCIAL RESPONSIBILITY FOR CLEANUP DOES NOT AFFECT GRAVITY OF VIOLATION

In a recent FWPCA civil penalty case, the Hearing Officer informed the party against whom a penalty was assessed that he considered the refusal by the vessel's master to take financial responsibility for the cleanup in his determination of the gravity of the violation. A determination of the gravity of the violation encompasses multiple considerations. The Marine Safety Manual lists several factors the Hearing Officer should consider. Although this list is by no means exclusive, the mere refusal by the vessel's master to take financial responsibility for the cleanup does not, upon facts such as presented in this case, affect the gravity of the offense. While in a given case a spiller may be required to follow certain orders of an on-scene coordinator, a spiller may not be required to accept financial responsibility. Of course, to the extent that a spiller's cleanup efforts effect gravity of a discharge, they may be taken into account. In this regard, see subpart 13-2-15, Marine Safety Manual.

G-LMI ltr 16460/7 of 11 Mar 1981

FWPCA PENALTY CASE --- DETERMINATION OF PROPER PARTY

The case file in a recent FWPCA civil penalty case was remanded for further proceedings because the final assessment letter failed to disclose the bases for the decision of the Hearing Officer. Specifically, the issue of determining the proper party against whom to proceed was one which had to be resolved in this case because there was more than one party against whom the penalty could legally have been assessed. However, the assessment letter and the file failed to clearly describe and substantiate the Hearing Officer's ruling on this issue, as required by Article 13-2-25c, Marine Safety Manual. Questions such as who was in overall charge of the oil transfer operation, who was responsible for adjusting strain on the oil hose assembly, who really initiated the cleanup operations, and what was the source of the spill were not addressed in the final assessment letter. In addition, the file indicated there were nine photographs taken which established the presence of oil in the water and its path to the water. However, the file on appeal no longer contained these photographs and there was no indication whether they were furnished to the Appellant or considered in assessment of the penalty.

G-LMI ltr 16460/3 of 25 Mar 1981

FWPCA --- RESPONSES TO FOREIGN FLAG TANKER INCIDENTS

The following chart was prepared in order to assist those responsible for making decisions concerning response authority in foreign flag tanker incidents. In order to keep the chart brief and to facilitate its use, certain matters were simplified and some legal issues which do not normally require resolution in the emergency phases of an incident were resolved.

FOREIGN FLAG TANKER INCIDENT DECISIONS & RESPONSES

	NAVIGABLE WATERS (including territorial sea)	CONTIGUOUS ZONE and HIGH SEAS
INTERNATIONAL AUTHORITY	1958 Convention on the Territorial Sea and the Contiguous Zone. Customary International Law.	1958 Convention on the Territorial Sea and the Contiguous Zone (for vessels in the contiguous zone). 1969 Intervention on the High Seas Convention, with protocol. Customary International Law (for non-parties to above).
DOMESTIC AUTHORITY	§311(c), FWPCA, to remove spilled oil and abate substantial threats (also H.S.). §311(d), FWPCA, to abate substantial threats from a marine disaster. §311(e), FWPCA, injunction to abate spill or threats. §104, CERCLA, to remove & abate H.S. threats	§311(c), FWPCA, to remove spilled oil & abate threats in connection with OCSLA & DWP activities or which may affect US exclusively managed resources (includes authority to remove & destroy vsls. but authority only in G-W. U.S. Intervention on the High Seas Act (IHSA).
DELEGATED AUTHORITY WITHIN C.G.	§311(c), FWPCA, OSC may take any action except summary removal or destruction of vsl. §311(c), FWPCA, vsl. removal or destruction authority is vested only in G-W. §311(d), FWPCA, vested only in G-W	§311(c), FWPCA, same delegations as for §311(c) in navigable water. Intervention on the High Seas Act, authority vested in G-C (See COMDTINST 16453.1)

NAVIGABLE WATERS	CONTIGUOUS ZONE
1) OSC determines that there has been a spill or there is a real threat of one.	1) same as for navigable waters
2) OSC begins cleanup or threat abatement. Convene RRT as appropriate. Notify G-W if foreign vsl. to be boarded so flag state can be notified.	2) If only action to be taken does not include boarding foreign vsl., or removing or destroying it, OSC acts under §311(c) authority and G-W monitors and calls NRT as necessary.
3) If OSC considers it necessary to summarily remove or destroy vsl., request authority from G-W. If appropriate, G-W delegates authority, citing both §§311(c) and (d). G-W take action to notify flag state and utilize procedures of Intervention Act even though Act not applicable. G-W convene NRT if appropriate.	3) If OSC determines necessary to board vsl. or to take more serious action against vsl., advise G-W. G-W acts as HQ Coordinator, advises G-C, convenes NRT, begins flag state notification process, and obtains G-C delegation to act under Intervention Act if appropriate. G-W advises OSC whether authority under IHSA is granted-specifically advise as to authority to board or not. In doing so, cite authority as §311(c) and IHSA, even if vsl. flies flag of non-party to Intervention Convention.

REFERENCES: 40 CFR Part 1510 - Nat'l Contingency Plan
33 CFR §153.105 - USCG Removal Authority Delegations
421 Law Bulletin 10 - Threat Abatement & Requisition Authority
COMDTINST 16453.1 - Intervention Action Guidelines
COMDTINST 16465.3 - Removal Policy Guidance
COMDTINST 16465.16 - Policy Guidance for Hazardous Chemicals

N.B. Domestic authority for designated hazardous substances is same as for oil. In acting beyond territorial sea, cite only §311(c) until Intervention Protocol enters force. (Also CERCLA for H.S.)

G-LMI memo 16465 of 12 Feb 1981

OIL RECORD BOOK REQUIREMENTS; DEFINITION OF "SEAGOING" VESSEL

A letter was received requesting clarification of the term "seagoing" vessel in 33 CFR Part 151. A seagoing vessel is one that normally operates in or seaward of the territorial sea. Oil Record Book entries are required for a seagoing vessel whenever any of the operations listed in 33 CFR 151.35 occurs.

G-LMI ltr 1660C/1 of 5 Feb 1981

R.S. 4450 PROCEEDINGS; FINALITY OF NARCOTICS CONVICTION UNDER MARYLAND LAW

A request was made to review Article 27, section 292 of the Maryland Code to determine the effect of a disposition under section 292(b) of Article 27 of a case involving prosecution under the narcotic drug laws of the state of Maryland; that is, would it constitute a corviction of the narcotic drug laws of the United States per 46 U.S.C. 239b. The request was for the purpose of providing direction to field units where this issue would arise during the processing of applications for Merchant Mariner's documents.

Section 292(b) provides that a court in the state of Maryland may under certain circumstances stay the entering of a judgment of guilt, defer further proceedings (sentencing) and place such a person on probation for a stated period of time. It also provides that the consent of the individual is necessary for this procedure to be employed and that the consent constitutes a waiver of all rights to appeal from the judgment of guilt by the court. Violation of the conditions upon which the stay of entering of the judgment of guilt was issued results in the entry of the judgment of conviction and further proceedings. Successful fulfillment of the terms and conditions results in the discharge of such person and the dismissal of proceedings against him. This occurs without a judgment of conviction. The expunged conviction is still relevant under other criminal statutes of the state of Maryland where the existence of a prior conviction is to be taken into account, with the exception of the use of such discharged conviction for purposes of second or subsequent offenses under the controlled dangerous substances subheading of the Crimes and Punishments article.

A conviction's finality under the statute is established so long as no court invalidates it for some error of fact or law in the proceedings that led to the judgment. A convictions finality is not drawn into question by judicial action to terminate or mitigate the impact of a conviction on a defendent's employment of rights the conviction or fact of it may have curtailed. Thus, when a court order speaks not to the validity of a conviction, but instead purports to extinguish the civil disabilities that ordinarily would flow from it, it does not undermine the conviction's finality for purposes of 46 U.S.C. 239b. This result inures since the factors which might warrant the annulment of a record of drug conviction do not necessarily bear a reasonable relationship to the factors the Commandant would consider in determining whether a specific individual should be permitted to engage in marine duty. So long as the Maryland statute does not impugn the validity of the drug conviction, but rather seeks to end or ameliorate the adverse civil or penal effects of the conviction, a "probation before judgment" would constitute a conviction of the narcotic drug laws of the United States for purposes of processing applications for merchant mariner's documents.

G-LMI memo 16722 of 3 Jun 1981

CITIZENSHIP REQUIREMENTS FOR CREWS OF U.S. DOCUMENTED VESSELS

A question was asked by an attorney concerning citizenship requirements for crews of certain U.S. documented vessels engaged in the fishing industry.

While your letter was somewhat sketchy as to the precise details concerning the operations and vessels involved, the basic requirements administered by the Coast Guard are as follows:

a) a vessel of the United States shall be commanded by a citizen of the United States, see e.g., R.S. 4131, as amended, and 22 U.S.C. 1971, as amended by the Antarctic Conservation Act of 1978;

b) all licensed officers and pilots of vessels of the United States shall be citizens of the United States, see e.g., R.S. 4131, as amended, 46 U.S.C. 672a and 46 CFR Part 10; see also 46 U.S.C. 690;

c) upon each departure of a vessel of the United States from a port of the United States, seventy-five percentum of the crew, excluding licensed officers, shall be citizens of the United States, see e.g., 46 U.S.C. 672a and 46 CFR Part 12; and

d) while it is not, strictly speaking, a citizenship requirement, you should be aware of the language requirement of 46 U.S.C. 672.

Although the above are the basic citizenship requirements which we administer; it will, of course, be necessary for you to carefully analyze all the relevant laws pertaining to the specific vessels and operations of your client to determine which laws are applicable and the extent to which they apply.

G-LMI ltr of 14 Apr 1981

REGISTRY OF CANADIAN VESSELS

The Chief, Operational Law Enforcement Division requested review of a letter which described law enforcement difficulties caused by the failure of Canada to issue documents to identify Canadian yachts as being entitled to the protections of the Canadian flag. The Chief, Maritime and International Law Division's response was as follows:

International law has long recognized the sovereign right of each state to determine the conditions under which it will grant its nationality to a vessel. This right bears with it an obligation on the part of the flag state to issue an official document as evidence of the ship's nationality, and insure that the vessel carries it. International law does not, unfortunately, specify the type or content of such documents.

Mere ownership of a vessel, evidenced by a bill of sale, is not indicative of the nationality of a vessel. Although ownership by a citizen may be a condition precedent to the granting of a particular nationality to a vessel, it is not conclusive, since many states will register a vessel owned by non-citizens. Thus a bill of sale or like document in the possession of a vessel claiming Canadian nationality does not compel recognition of the claim. We could, of course, accept such a claim absent contrary evidence, for reasons of harmonious relations, etc. However, Canada could not legitimately object to our demand that some official document be carried by vessel asserting Canadian nationality. It would appear appropriate to initiate discussion with Canada in regard to the issue, through the Political Advisor to the Commandant, and the Department of State.

The absence of a document attesting to a vessel's registry does not imply that a vessel is stateless. Generally, commentators have taken the view that a vessel will carry the same "nationality" as its owner if not registered, but the character of the nationality is akin to that of personal property and not equivalent to nationality in the sense customarily attributed to registered and documented vessels.

Although a port state has virtual plenary power to establish port entry requirements, it does not appear that U.S. law currently demands that vessels be documented prior to arrival at a U.S. port.

Informal communication with a legal adviser to the Canadian Transport Department has verified that the Canadian Shipping Act exempts from registration all pleasure yachts of up to twenty tons wherever employed or operated, and exempts ships not exceeding fifteen tons employed solely in navigation on the lakes, rivers, or coasts of Canada. Thus, any vessel in excess of fifteen tons located off the coasts of the U.S. (not in proximity to Canada) must be registered to claim the right to fly the Canadian flag, unless it is a pleasure yacht of no greater than twenty tons. A pleasure yacht is a ship, however propelled, that is used exclusively for pleasure and not carrying "passengers" (in the sense of passengers for hire in U.S. law).

Unregistered Canadian vessels must, however, be licensed in accordance with the Canadian small vessel regulations. These apply to all vessels of less than fifteen tons and pleasure yachts of less than twenty tons propelled by motor of ten horsepower or greater. Although the regulations are somewhat loosely administered, they prohibit any person from operating such a vessel without the license. The license is issued, upon request, by a Canadian customs officer and must be carried onboard. The same regulations require that the vessel bear numbers on each bow in 75 mm high figures, which correspond to the license. The possession of such a license would be prima facie evidence of Canadian nationality and of the right of the vessel to fly the Canadian national flag. If a vessel claiming Canadian nationality, and exemption from registry, fails to produce a license, detention for a reasonable time to conduct further inquiry appears appropriate.

It should be noted that the foregoing discussion is only appropriate when the nationality of the vessel is a consideration. For example, Canadian nationality is not a defense to an enforcement operation within our customs waters, which is otherwise consistent with U.S. law.

G-LMI memo 5800 of 28 Jul 1981

TERRORIST INCIDENT DIRECTED AT OCS FACILITY

Information received by [you] that a bomb threat or interference effort will be mounted against semi-submersible rig located 125 miles offshore. It is believed that the threat will be timed to coincide with a media event planned by the owner of the rig, to occur onboard the facility. At present the facility is secured in position by its six positioning anchors, and preparation for exploratory work is underway. The following laws and regulations are deemed applicable:

a. The Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. 1350, and 33 CFR Part 147 (Safety Zones). This statute and its implementing regulations provide for the establishment of a safety zone with a radius of 500 meters around OCS facilities. The zone arguably is measurable from the outer edge of the "construction site," which may be taken to mean the loss of the anchors. The district commander has the authority to establish such a zone on an emergency basis, on very short notice. Violation of the safety zone renders a person liable for a civil penalty of up to $10,000, or if the violation is knowing and willful, a criminal penalty of up to ten years imprisonment and/or a fine of $100,000.

b. Additionally, it should be noted that the foregoing statute subjects the area adjacent to a facility to jurisdiction as if it were a "place" of the United States. The Ports and Waterways Safety Act (33 U.S.C. 1223(b)) provides that for safety reasons, a Captain of the Port may direct the movement or operations of a vessel in a "port or place" subject to the jurisdiction of the United States. Under 33 CFR Part 160, these special powers could be exercised in the described situation to order an intruding vessel out of the zone. The advantage of this approach is that a violation of the order would subject the vessel itself to seizure under the terms of 14 U.S.C. 89 or 19 U.S.C. 1581(e). The PWSA also carries civil and criminal penalties as well.

c. Internationally, Article 5 of the 1958 Geneva Convention on the Continental Shelf recognizes the right of a coastal State to construct such structures, to establish safety zones and to take measures necessary for their protection. Consequently, regardless of the flag of the vessel that may be employed, access of persons or vessels may be limited within the safety zone, as necessary, for the promotion of safety of life and property. Thus, there is no limitation in international law which would deny the right of the United States to respond to such an incident should it occur.

G-LMI memo 5800 of 22 Jul 1981

TOWING LIGHT REQUIREMENTS ON COAST GUARD AUXILIARY VESSELS

[You] requested comment on the application of section 16(b) of the Federal Boat Safety Act of 1971 (FBSA) to auxiliarists engaged in towing, should towing lights not be displayed. Under the inland and international rules of the road, auxiliary vessels engaged in towing must display appropriate towing lights unless an exemption has been obtained.

Section 16(b) would not exonerate an auxiliarist who does not display towing lights when engaged in towing for several reasons. First, section 16(b) does not exempt one from the rules of the road. Second, section 16(b) only applies when there is a vessel collision, accident or other casualty. Thus, if a vessel was in distress solely because it was out of gas, section 16(b) would not apply. Third, section 16(b) exonerates the rescuer from civil damages with respect to the person or persons being assisted. Thus, if the rescuer takes under tow a vessel which was in a collision, and does not display the appropriate towing lights; and, as a result, collides with another vessel, section 16(b) would not exonerate the rescuer from liability vis-a-vis the vessel with which he collides. Fourth, section 16(b) only exonerates one who acts as an ordinary, reasonably prudent man would have acted under the same or similar circumstances. It is more likely than not a court would find that an auxiliarist, who, as part of his normal duties tows at night and does not display towing lights, has not acted as an ordinary, reasonably prudent man would have acted under the same or similar circumstances. Finally, section 16(b) is a defense that a good samaritan would raise in a civil liability proceeding. It is not a claim the Coast Guard raises on behalf of an auxiliarist. It is for the court to decide whether the rescuer is entitled to the defense.

Auxiliarists operating under orders expose the Government to liability for acts or omissions occurring when performing their duties. To condone the non-use of required lights, other than through the formal exemption process, exposes the Government to increased liability.

G-LMI memo 16798 of 15 Jul 1981

GEOGRAPHICAL SCOPE OF TOWING VESSEL OPERATOR LICENSES

Advice was requested as to whether the authority of an OCMI to issue operator licenses under 46 CFR §10.16-11(b)(6) only applies in a very limited circumstances and is limited to geographic areas around a shipyard, dredge, or a specific facility. The Chief Counsel's comments on the question were as follows:

46 U.S.C. 405(b)(2) requires that uninspected towing vessels shall, while underway, be under the actual control and direction of a person licensed to operate in a "particular geographic area." The relevant implementing regulations for this statute spell out six types of specific geographic areas for which a license may be endorsed:

(a) Inland Waters;
(b) Western Rivers;
(c) Great Lakes;
(d) Oceans;
(e) Oceans not more than 200 miles offshore; and
(f) A limited local area designated by the OCMI

33 CFR §10.16(b).

Thus, the "limited local area" is one type of a "particular geographic area" and is the regulatory creature provided for limiting licenses to small or intermediate size areas of lesser scopes than those spelled out in categories (a) through (e).

The testimony during the congressional hearings on the Towing Vessel Licensing Bill included indications that there was at the time a high failure rate for certain Coast Guard licensing examinations which were perceived as covering materials not necessary for seafarers engaged in limited trades. Hearing on H.R. 6478 Before the Subcommittee on Merchant Marine of the Senate Committee on Commerce, 92d Cong., 2d Sess., Ser. No. 92-86 (1972). Further, the House report on H.R. 6479 indicated a dual Congressional intent concerning the implementation of the "particular geographic area" concept. H.R. Rep. No. 92-125, 92d Cong., 1st Sess:

> The particular geographic area ". . . is intended to coincide with areas of applicability of the differing sets of nautical rules of the road, for example, inland rules, Great Lake rules, western river rules and international rules. It is also your committee's intent that the licenses be as broad as practicable and the examinations to be given should insure an adequate knowledge of each set of nautical rules of the road for the area to which the license applies."
>
> "It is further intended that, where appropriate and at the request of the potential licensee, the license may be restricted to one or more geographical areas for which the individual desires to limit the scope of his license and therefore his examinations."

The latter of the above intentions clearly represents the balancing compromise involved in fulfilling the Coast Guard's desire to simplify administration and testing by issuing licenses for areas corresponding to those areas covered by the different sets of rules of the road while solving the problem of people failing tests which covered certain safety and navigational topics not applicable to their everyday livelihoods. The Congressional intent emphasizes the concern for the wishes of the applicant in choosing between a regular license and a restricted one. Thus, it cannot be said that this is an area in which the Coast Guard or the OCMI has unlimited discretion.

In the interpretation and implementation of unclear statutory language, an administering agency's policies are normally given a wide measure of deference by the courts. However, where the agency's policies and interpretations vacillate or change over a period of time, deference is only given to those which were closely contemporaneous with the implementation of the statute, with lesser regard being had for subsequent changes of the agency mind. See e.g. U.S. v. Soriano, 498 F.2d 68 (9th Cir. 1974). Thus, present day expressions of Coast Guard policy cannot be accorded great weight without first examining our earlier positions. In the explanation of the term "limited local area," which was being published in regulations intended to implement the 1972 act, the Coast Guard recognized the applicant's right of choice:

> "Licenses endorsed for a limited local area may be issued if the applicant has limited experience. Also, as intended by the law, where appropriate and at the request of the applicant, the license may be endorsed for a local area to which the appellant desires to limit the scope of his license. In both cases, he would be given a limited examination appropriate for the area." 37 F.R. 16374 (August 11, 1972).

This was further reinforced when the proposed implementing rules, published on 11 August 1972, were published as final rules on 2 March 1973. Again the explanation exphasized the linkage between the terms "particular geographic area" and "limited local area," and the applicant's capability for making a choice:

> "Section (b)(2) of the Act requires a person to be licensed 'to operate the particular geographic area.' The interpretation of this wording appears in the Senate Report . . . which states that the geographic area is intended to coincide with areas of applicability of the differing sets of nautical rules of the road . . . ."
>
> "Finally, in response to comments that the proposed geographic areas might prove too broad in scope, the Coast Guard points out that an applicant may request a more limited route . . . . 38 F.R. 5746, at 5747 (March 2, 1973)."

In view of the strong affirmations of the applicant's right to choose a license limited to an area of less geographic scope than one covered by a set of the rules of the road, we must examine whether the attempted restrictions placed on this right in this case are correct and defensible. In particular, the 22 March 1979 letter of the OCMI to the applicant stated that the OCMI's authority to issue a license for a limited area only applies in "very limited circumstances whereby an operator only worked an area in and around a shipyard, dredge, specific facility, etc." The letter stressed that it would be preferable to have applicants "attend a school and improve their knowledge" rather than to have the Coast Guard devising examinations tailored to limited service areas for "applicants who lack the initiative to better themselves through study." Similarly, while admitting the inappropriateness of some of the requirements in this area concerning small vessels, the OCMI, in a letter of 5 April 1979, nevertheless stated that he had been "very restrictive" in issuing limited licensed in other areas of the country and saw no reason to be more relaxed in the zone.

Insofar as the statement concerning limited licenses only applying to areas around dredges, shipyards, and the like is concerned, I regret to advise you that I can find no support for this position. On the contrary, Navigation and Vessel Inspection Circular No. 3-74 implies quite the contrary by stating, "The limited route granted (by the OCMI) should lie wholly within his inspection zone unless he obtains agreement from other affected OCMI's to extend the route beyond his zone." Thus, we have specifically recognized that the authority to issue limited licenses may extend to areas as large as one or more OCMI zones, rather than being limited to merely a dredge or shipyard. Further, the OCMI's view that he may be "very restrictive" in issuing limited licenses cannot be reconciled with the applicant's recognized right of choice. His desire to have applicants go to unnecessary schools so as to avoid the need for tailoring exams is in direct opposition with the legislative history of 46 U.S.C. 405(b), the explanations behind 46 CFR §10.16-11(b), and NVC 3-74.

In finding that the OCMI's decision not to issue limited licenses for areas greater than the area of a dredge or shipyard is incorrect, I am offering no opinion on the proper content of the examinations for the limited licenses. However, there is ample guidance in the legislative and regulatory history concerning this point.

G-LMI memo 16721 of 31 Aug 1981

AIDS TO NAVIGATION SERVICES; CONTRACTING OF

The Chief, Short Range Aids to Navigation Division requested an opinion concerning the authority of the Coast Guard to contract out aids to navigation duties and tasks, and solicited advice as to any legal ramifications that may be of concern if such action is undertaken. Initially, it must be pointed out that since the aids to navigation "duties" and "tasks" being considered for contract were not identified, my response must necessarily be of a general nature. It is my opinion that the initial decision as to the need for a federal aid in a particular location is a function inherently governmental in nature and cannot be contracted out under the present statutory scheme. However, the manufacture, maintenance, servicing, and repair of aids does not involve the same discretionary considerations and therefore could be subject to contracting out.

Under 14 U.S.C. 81 through 84 and 86 the Coast Guard is given broad authority respecting the establishment, maintenance, and operation of aids to navigation. Moreover, under 14 U.S.C. 81 and 86 the decision as to the establishment of federal aids is discretionary. Among a few of the statutory factors to be considered when determining the need for a federal aid are the needs of the armed forces or of the commerce of the United States, the needs of the armed forces . . . peculiar to warfare, and the protection of navigation. Additionally our regulation requires aids to be useful for commerce of a substantial and permanent character, and justified in terms of public benefit to be derived therefrom. 33 CFR 62.01-1(c). Determinations under these broad guidelines involve policy judgments and the balancing of various competing interests that are inherently governmental in nature. Paragraph 5 of OMB Circular A-76 of 29 March 1979 defines governmental functions which may not be contracted out. Included in that definition are actions involving discretionary application of government authority, and management of government programs requiring value judgments. It is my opinion that the initial decision as to the need for an aid clearly falls within the above definition and must be performed in-house.

The manufacture, maintenance, servicing, and repair of federal aids is another matter. It is my opinion that contracting out these activities would be permissible. Under 14 U.S.C. 93(1) Congress clearly authorized the manufacture and construction of aids to navigation by private contractors. Additionally, authority for private individuals to repair or replace damaged aids can be found in 14 U.S.C. 642. This is consistent with the Government's general policy of reliance on the private sector for goods and services, subject to various qualifications.

It should be noted however, that enclosure (1) of G-CPA memo 7100/WWM of 3 June 1981 established a Coast Guard Unified Policy Statement respecting contracting out various classes of activities under OMB Circular A-76. The operation of Loran stations was designated a "Governmental Function" in paragraph I(d) of the enclosure. Additionally, under paragraph I(h) all Coast Guard activities located outside the United States, its possessions and territories, and the Commonwealth of Puerto Rico were likewise designated "Governmental Functions" not to be contracted out. Paragraph II(c) of the enclosure also listed "on site maintenance and servicing of aids to navigation, and an in-house capability for ashore maintenance and servicing to the extent required to ensure a rapid response capability" as activities anticipated to be retained in-house for reasons of national defense.

To a certain extent legal issues involved in contracting out aid to navigation tasks will depend largely on the tasks involved and the form of the contract. However, notwithstanding our contracting out the placement of an aid, the legal liability of the Coast Guard respecting position accuracy would seem to be unchanged. Accordingly, verification of the placement by Coast Guard personnel would be beneficial.

G-LMI memo 16671 of 3 Aug 1981

CONFLICT BETWEEN 33 CFR 179.11 AND THE BOATING STANDARDS MANUAL, COMDTINST M16761.2 (OLD CG-459)

You requested an opinion concerning a perceived conflict between 33 CFR 179.11 and the Boating Standards Manual, COMDTINST M16761.2 (Old CG-459), as they relate to defect notification campaigns under section 15 of the Federal Boat Safety Act of 1971. The pertinent provision of 33 CFR 179.11 provides that the "Commandant" initiates a campaign under section 15(e) of the Act. COMDTINST M16761.2 authorizes "the home district" to initiate campaigns for failure to comply with a standard or regulation. This issue arose in a recent civil penalty case when a district hearing officer remanded the case because the campaign was not initiated by the Commandant. I conclude that the action of the hearing officer was correct insofar as the manufacturer was charged with a violation of 33 CFR 179.11.

Section 179.11 is clear on its face and gives no indication that anyone other than the Commandant may initiate a defect notification campaign under section 15(e) of the Act. The sample letter of noncompliance notification does not indicate in any way that the Commandant's authority has been delegated. Since we have not followed our published regulations, and have not clearly and positively given the manufacturer notice of our internal delegations, penalty action based on 33 CFR 179.11 is inappropriate.

In taking this position, I have not assumed that the delegation of authority to district personnel is invalid because it is issued in the form of an instruction. Courts have not consistently held that delegations of authority must be published in the Federal Register in order to be effective. A number of cases indicate that this is only necessary if a delegation of authority would have an adverse effect on a member of the public, or affect the manner in which a member of the public may present a matter to an agency. Notification by district personnel that a product fails to comply with federal standards has no adverse effect on a manufacturer who wishes to challenge the non-compliance determination. He is informed to direct his response to a district office rather than Headquarters; however, this should be regarded as an administrative detail that would not alter the preparation or presentation of the manufacturer's response. It is therefore doubtful that a court would find the delegation of authority under consideration invalid because it was not published in the Federal Register.

The internal delegation's principal infirmity results from its direct conflict with specific procedures established in our regulations. A related problem involves the language of the internal delegation. Delegations of authority should specify the officer or office to which the authority is granted. The term "home district" specifies neither.

I am constrained to disagree with the interpretation of section 15 of the Act advanced by the district legal office. The pertinent sentence of the memo provides - "it seems to me that the only time that the notification requirement is placed upon the manufacturer is either when he discovers by himself or acquires from some other source (not the Coast Guard), information indicating a compliance failure or a defect, or when he receives a notification of defect or failure of compliance from the Commandant." This interpretation does not take into account the independent duty placed upon manufacturers to make a determination under section 15(a) of the Act.

While notice from district personnel to manufacturers of noncompliance with regulations will not under our current procedures, as discussed above, mandate a campaign under section 15(e) of the Act; it does not follow that this information may not be considered when making a determination under section 15(a) of the Act. Under section 15(a) a campaign is not mandated until a manufacturer discovers or acquires information which he determines indicates non-compliance with regulations or a defect. An interpretation which limits the information a manufacturer may use in making this determination runs counter to both the underlying principles and to the express wording of the act.

The "discovers or acquires information" language of the section is in no way limited. Additionally, the legislative history of the Act references numerous amendments to the original language of the section. These amendments were perceived as substantial improvements from the point of view of safety and protection of the boating public. Moreover, safety related statutes are broadly interpreted so as to favor finding their requirements applicable over the wildest permissible range of cases and circumstances. Given the underlying purposes behind the section an interpretation foreclosing consideration of any information pertaining to safety does not appear warranted. Accordingly, it is my opinion that any information available to a manufacturer, including that supplied by the Coast Guard, must be considered by the manufacturer when making a determination under section 15(a) of the Act.

For the reasons discussed above, we could in appropriate cases, continue to bring civil penalty actions against manufacturers who fail to conduct campaigns after receiving notification from district personnel. We would of course be faced with the added burden of proof required by section 15(a) of the Act. However, I do not recommend that we take this course, except for particularly egregious cases. Any regulations, Coast Guard Organizational Manual provisions, and form letters dealing with defect notification should be reviewed to determine whether they need revision to more clearly reflect our practices in this area. As a quick interim solution, we should reissue the form letter of non-compliance notification to clearly indicate a district officer has been delegated authority to notify manufacturers that their products do not comply with federal standards. Following this action the regulations in 33 CFR 179 should be revised to reflect the dual authority in this area.

G-LMI memo 16762 of 19 Aug 1981

HANDLING OF DANGEROUS CARGO AT WATERFRONT FACILITIES

Penalties totalling $500 were assessed upon the finding that two violations of 33 CFR 126.15(j) occurred on 26 March and 25 June 1980. In determining that a civil penalty case must be dismissed, the Commandant noted:

Therefore, the case record does not contain evidence establishing that the appellant violated this regulation. 33 CFR 126.13 prohibits the "handling, [etc]," of dangerous cargo at any waterfront facility that fails to comply with all the requirements of 33 CFR 126.15. In the instant case it is alleged that the appellant failed to comply with 33 CFR 126.15(j). The person "handling" the dangerous cargo is the entity responsible for compliance with the regulation and there is no evidence that the appellant handled or stored the items alleged to be dangerous cargo. In fact, the evidence shows that the appellant merely owns the facility and that the handling and storage of the cargos are performed by other parties, apparently including the lessee of the facility.

G-LMI ltr 16600/11 of 18 Aug 1981

NAVIGATION CHARTS AND PUBLICATIONS

A party was assessed civil penalties *inter alia* for not having current navigational publications onboard a vessel. On appeal the party asserted that current equivalent British publications were onboard.

The appeal of the two penalties assessed for violations of 33 CFR 164.33(a)(2) was granted and the penalties assessed dismissed. 33 CFR 164.33(b) states that a vessel may have a chart or publication published by a foreign government instead of a chart or publication required by this section if the chart or publication contains similar information to the U.S. Government publication or chart. The evidence in the record was insufficient to rebut the appellant's presentation of evidence that the foreign equivalents were onboard. The $250 penalty assessed for these violations have been deducted from the total penalties due.

G-LMI ltr 16600/7 of 14 Jul 1981

CIVIL PENALTY PROCEDURES --- LETTER OF COMPLIANCE DOES NOT EXCUSE SUBSEQUENT VIOLATIONS

A party was assessed civil penalties for violations of 33 CFR 155.320 and 33 CFR 155.340. On appeal that no penalty should be assessed because its vessel had been inspected regularly and was given a letter of compliance on 16 August 1978, and because the deficiencies were immediately corrected upon notification of such. The appeal was denied for the reasons stated below.

I have reviewed the arguments raised in your appeal and find that proper consideration has been given to the applicable provisions of law in evaluating the facts in this case. There is substantial evidence in the file that supports the hearing officer's finding that the subject vessel was in violation of regulations at the time of the inspection. This justifies the assessment of civil penalties as authorized by statute. Factors such as regular inspections and corrective action bear on the gravity of the violation and affect the amount of the penalty assessed, not your liability to sanction. The essence of your argument is based upon a misconception of your responsibility under the cited regulations. A letter of compliance should not be relied upon to excuse subsequent violations nor are violations excused by subsequent remedial action. Vessel owners and operators are responsible for assuring continued compliance. Failing to so assure results in civil penalty liability.

G-LMI ltr 16460/7 of 27 Aug 1981

CIVIL PENALTY PROCEDURES --- DISMISSAL FOR LACK OF SUBSTANTIAL EVIDENCE

A party appealed the assessment of a penalty for allegedly failing to display running lights between sunset and sunrise, in violation of Rule 20(b) of the International Rules of the Road (33 U.S.C. 1602). It was alleged that the violation occurred when the party's vessel collided with another vessel in the Atlantic Ocean. The Commandant's response was as follows:

In order to assess a civil penalty for the violation of 33 U.S.C. 1603 in this case, there must be substantial evidence in the record that the vessel failed to display running lights. See 33 CFR 1.07-65(a). The only evidence in the record which supports the hearing officer's finding of a violation are self-serving statements by two crew members of a vessel which collided with the party's vessel which indicate that the running lights on the party's vessel were not displayed. These statements by interested persons are not corroborated by any independent evidence in the record. Accordingly, the case must be dismissed for lack of substantial evidence.

G-LMI ltr 16781/3 of 29 Jul 1981

CIVIL PENALTY PROCEDURES --- REMAND FOR LACK OF SUBSTANTIAL EVIDENCE

Subject case is remanded for further action. The file fails to establish any evidence that there was no valid certificate of inspection (COI) on board. The narrative summary on the Report of Violation is not sufficient because it was not evidence discovered as the result of a boarding. There is no witness statement that no COI was onboard, no admission of such by the company, and no indication of a negative records check to establish the fact of non-issuance of the COI. The file may be returned to the program manager to establish that such evidence exists, or the case may be dismissed without prejudice in accordance with 33 CFR 1.07-65.

G-LMI ltr 16731/5 of 14 Jul 1981

CIVIL PENALTY PROCEDURES --- IMPROPER NOTIFICATION

In a recent civil penalty case, the letter of notification was addressed to the owner of a vessel in care of an agent. A response to this notification was received from another company, who advised that their ties to the owner as agent and stevedores had been terminated. This letter was considered by the hearing officer and on 16 October 1980 an assessment letter was sent to the company that submitted a response. In response to this, a letter of appeal was received from the first purported agent, who advised that it was no longer associated with the owner. There is no correspondence from the owner in the file, and in light of the fact that these companies are no longer associated with the owner, they cannot be considered as acting on its behalf.

Accordingly, the case file was remanded to the hearing officer with instructions to send notification of the violation directly to the owner for a response to the charge.

G-LMI ltr 16600/7 of 18 Aug 1981

CIVIL PENALTY PROCEDURES --- FAILURE TO ATTEND OR CANCEL A SCHEDULED HEARING

The assessment of a civil penalty was based on the finding that, in violation of 33 U.S.C. 1321(b)(3), a quantity of oil was discharged from a company's facility into the Kill Van Kull at Bayonne, New Jersey, on 20 February 1980, causing one or more of the conditions specified in 40 CFR 110.3(b). On appeal it was argued that the assessment of penalties was invalid because notice was not sufficiently in advance to allow the company's representative to prepare for the hearing.

The argument you raise in your appeal is unpersuasive. A review of the record reveals that a hearing was initially scheduled for 25 September 1980. On that date, a telephone call was received cancelling the hearing for the same day and rescheduling it for 3 October 1980. A letter confirming this date was sent on 29 September 1980. Your assertion that it was not received by you until the afternoon of 3 October 1980 is irrelevant as the hearing was scheduled by telephone on 25 September 1980, from which time you were on notice. This hearing was not attended nor cancelled by your representative. By letter of 8 October 1980, the hearing officer summarized your failure to attend the two hearings previously scheduled and gave you 15 days to schedule and attend a hearing or a penalty would be assessed based on the evidence in the file. You did not respond to this letter and on 22 October 1980, more than 15 days after the 3 October 1980 letter, instead of assessing a penalty based on the evidence in the file, he gave you an additional 15 days to schedule and attend a hearing. This letter was delivered to your representative by hand on 28 October 1980. There is no evidence in the file, such as his affidavit, to support your assertion that your representative was not prepared for this hearing. At no time during the hearing did he indicate that he was not ready to present evidence on your behalf . . . .

G-LMI ltr 16460/3 of 10 Aug 1981

CIVIL PENALTY PROCEDURES --- DISMISSAL FOR LACK OF SUBSTANTIAL EVIDENCE

A penalty was assessed against a party for carrying passengers for hire in violation of 46 U.S.C. 1461(e). In dismissing the penalty, the Commandant made the following comments to the hearing officer:

The hearing officer failed to comply with 33 CFR 1.07-20 in charging a violation of 46 U.S.C. 1461(e). The district commander is required to refer alleged violations to the hearing officer. The hearing officer is required to review the material submitted to determine that there is sufficient evidence to proceed. Although the violation of 46 U.S.C. 1461(e) was referred to the hearing officer, there is no evidence that the violation occurred. Since the vessel was subject to 46 U.S.C. 390 *et seq*., it was not subject to 46 U.S.C. 1461(e). Thus, it is apparent that the hearing officer failed to determine if there was sufficient evidence to proceed, as required by 33 CFR 1.07-20(a). In view of the foregoing, the penalty of $1,000 assessed for this violation has been dismissed.

G-LMI ltr 16781/7 of 29 Jul 1981

CIVIL PENALTY PROCEDURES --- FAILURE TO SPECIFY THE VIOLATIONS FOUND PROVED IN THE LETTER OF ASSESSMENT

The final assessment letter in a recent civil penalty case failed to disclose the violations which were found proved and for which the penalties were assessed. It further failed to disclose the amount assessed for each violation found proved. In order to provide an opportunity for a full and fair appeal of a penalty decision, and as an element of procedural due process, the appellant is entitled to adequate notice of the hearing officer's findings. See *United States v. Independent Bulk Transport, Inc.*, 394 F.Supp. 1319 (S.D.N.Y. 1975).

G-LMI ltr 16781/7 of 29 Jul 1981

FWCPA PENALTY CASE --- NAVIGABLE WATERS

A company contested a civil penalty assessed under the authority of 33 U.S.C. 1321(b)(6). The assessment was based on the finding that, in violation of 33 U.S.C. 1321(b)(3), a quantity of oil, estimated at 500 gallons, was discharged from the facility's drainage ditch into Penhorn Creek on or about April 1977, causing one or more of the conditions specified in 40 CFR 110.3(b). The discharge occurred when the facility's underground gasoline tank and pipe system leaked due to corrosion.

On appeal the company did not deny that a harmful quantity of oil was discharged from its facility, or that Penhorn Creek is a water of the United States subject to the FWPCA. Rather, it contended that the receiving water was a drainage ditch which was not subject to the FWPCA.

Your contention that oil was not discharged from your facility into Penhorn Creek is not supported by the evidence in the record. The investigation report, which was complied by Coast Guard personnel who inspected the spill area, states that there was a sheen of oil on Penhorn Creek. An employee of your company who observed the spill area stated that 500 gallons of oil from your facility entered Penhorn Creek. Another employee indicates in his statement of 28 February 1978 that gasoline from the station entered Penhorn Creek. He also states that a cleanup operation was performed on the creek, and that absorbent booms were still in the creek. It is stated in the narrative summary that sink holes six feet from Penhorn Creek contained gasoline. Coast Guard personnel searched for all other possible sources but found none. Accordingly, I find that there is substantial evidence in the record to support the hearing officer's finding that a harmful quantity of oil was discharged from your facility into Penhorn Creek.

As you submit in your appeal, there is substantial evidence in the record that the Penhorn Creek is a tributary to the Hanckensack River, a navigable water of the United States. The coverage of the Federal Water Pollution Control Act is not limited to the traditional concepts of "navigability." Rather, it is our opinion that the statute now encompasses the entire riverine system within the United States extending upstream to the sources, whatever and wherever they may be. It, therefore, includes nearly all of the water bodies that exist in the United States. Thus, it is the Coast Guard's position that navigability is no longer a controlling factor, and that discharges of oil into any of the waters which flow into the traditional navigable waters of the United States are also prohibited. See 33 CFR 2.05-25(b). See also, United States v. The Texas Pipe Line Company, 611 F.2d 345 (10th Cir. 1979), United States v. Ashland Oil and Transportation Co., 504 F.2d 1317 (6th Cir. 1974). The District Legal Officer found in an independent investigation that the Penhorn is a tributary to the Hackensack River, despite the fact that there may not have been a continuous flow at the time of the violaton. However, water does not have to be continually flowing into a navigable water in order to be considered a tributary. See, e.g. United States v. The Texas Pipe Line Company, supra; Holland v. United States, 373 F.Supp. 665 (M.D. Fla. 1974). A Coast Guard investigator observed that there is at least a periodic flow of water from the Penhorn into the Hackensack River. Statements made by the New Jersey Department of Transportation and the Hudson County Division of Engineering also indicate that there is at least a periodic flow of water in Penhorn Creek. Therefore, the Coast Guard has jurisdiction over discharges of oil into Penhorn Creek.

You contend, however, that the body of water adjacent to your facility, in which you admittedly discharged oil, was a drainage ditch which did not flow into any navigable waters of the U.S. You argue that the ditch is not subject to the FWPCA because its flow was blocked by vegetation and debris at the culvert running underneath Route 3. Even if Coast Guard and company personnel were mistaken in identifying this ditch as Penhorn Creek, I find there is substantial evidence in the record that this unnamed ditch was a tributary to Penhorn Creek and, therefore, a water of the United States subject to the FWPCA.

As stated above, the fact that there may have been no noticeable flow of water in the ditch at the time of the discharge is not conclusive as to its status as a tributary. The district legal officer found in an independent investigation that this ditch was a tributary to the Penhorn even though its flow was blocked by debris and vegetation. The evidence you have submitted does not rebut this finding. The fact that a dye test performed on 24 August 1978 showed no movement of the water on that date is not conclusive as to the ditch's status as a tributary. The fact that a letter from the New Jersey Department of Transportation indicates that the culvert headwalls were subsequently cleared and that water now noticeably flows in the ditch is also not conclusive as to the ditch's status as a tributary. Accordingly, I find there is substantial evidence in the record that this ditch is a navigable water of the United States within the meaning of the FWCPA.

G-LMI ltr 16460/3 of 27 Aug 1981

FWCPA PENALTY CASE --- NOTICE AND OPPORTUNITY TO RESPOND

The hearing officer assessed a penalty of $500 against the Appellant based upon a finding that on or about 25 May 1980 the subject vessel, owned by the Appellant, discharged a harmful quantity of oil into the Cayuhoga River, a navigable water of the U.S. In determining whether the size of the penalty assessment was appropriate to the size of Appellant's business and whether it would be detrimental to the Appellant's ability to continue in operation, the hearing officer improperly considered information excerpted from the 1980 Great Lakes Red Book.

It does not appear in the record that a copy of the 1980 Great Lakes Red Book excerpt was sent to the Appellant, so as to afford Appellant an opportunity to respond or rebut its content before the hearing officer made the penalty assessment. Failure to do so is a violation of the notice requirement in 33 U.S.C. 1321(b)(6) and of the requirement of due process. U.S. v. New York Biuminous Products Corp., 75 Civ. 4981 (unreported) (S.D.N.Y. 1979); U.S. v. Independent Bulk Transportation, Inc., 480 F.Supp. 474, 482 (S.D.N.Y. 1979). Moreover, the aforementioned excerpt does not alone constitute sufficient evidence to establish that the appellant is financially supported by the presumed parent corporation to which the Red Book excerpt refers. Therefore, the case file is remanded for further action.

G-LMI ltr 16460/9 of 4 Aug 1981

FWPCA PENALTY CASE --- HARMFUL QUANTITY OF OIL

A party appealed the assessment of a civil penalty based on a finding that, in violation of 33 U.S.C. 1321(b)(3), a harmful quantity of oil was discharged from its facility into the Acushnet River on 9 August 1977. The discharge ocurred when oil escaped from an oil and water separator located at the facility. The oil entered a drain which emptied into a sewer having an outfall into the Acushnet River. On appeal the party did not deny that oil entered the river from the separator or that a sheen existed at the outfall in the river. Rather, it was contended that there is an insufficient basis to support the hearing officer's finding that the sheen in the river resulted from the discharged oil. The Commandant denied the appeal for the reasons which follow.

The hearing officer's finding which you have challenged is supported by the following statements contained in the investigator's report:

> "Oil was observed escaping from the oil/water separator and flowing into a drain which an employee of the company stated emptied into the outfall"; and
>
> "The . . . team observed oil coming from the outfall creating a visible sheen on the Acushnet River . . . ."

You do not challenge either of these statements but assert that the "extremely minute quantity of oil" would not have resulted in the sheen in the river. In earlier letters, which you include by reference, you have called attention to unknown upstream sources which you allege have been shown to exist at various times in the past.

I have carefully examined the record, but have failed to find any evidentiary basis for your assertion respecting the "extreme minuteness" of the amount of oil discharged on 9 August 1977. Nor do I find such basis for your assertion that no sheen would result from the release of the oil. As a matter of logic alone, this assertion is difficult to accept. The evidence shows that the area of the river immediately adjacent to the outfall served as a boomed containment to accumulate oil discharged from the outfall. Absent some showing to the contrary, it was reasonable for the hearing officer to find that oil, which you admit was discharged from your facility into the river via the outfall, accumulated and formed at least some portion of the sheen, which you also admit existed.

In view of the foregoing, the existence or non-existence of the other sources is not relevant to the company's liability under 33 U.S.C. 1321(b)(8). Even if such relevance were shown, I also note that the record is devoid of any showing that on 9 August 1977, oil was being discharged from other sources using the sewer system. The two incidents referred to in the company's earlier correspondence are inadequate to establish a continuing condition.

G-LMI ltr 16460/1 of 18 Aug 1981

FWPCA PENALTY CASE --- DETERMINATION OF PROPER PARTY

The assessment of a civil penalty was based on a finding that, in violation of 33 U.S.C. 1321(b)(3), a quantity of oil was discharged from a facility owned by the company into Corpus Christi Harbor, on 6 August 1977, causing one or more of the conditions specified in 40 CFR 110.3(b). The discharge occurred when a hose transfering oil from a tank truck (both hose and truck being owned by the company) ruptured.

On appeal you do not challenge the hearing officer's finding that the violation occurred or the amount of the penalty assessed in this case. Rather you contend that the assessment of the penalty against the company rather than against [another company's] Wholesale Commission Agent, constituted arbitrary and capricious action by the hearing officer. Further you argue that the decision in U.S. v. Georgetown University, 331 F.Supp. 69 (1971) should be applied. Your appeal is denied for the reasons stated below.

You do not challenge here the evidence contained in the record showing that the company was the owner of the facility (the truck and hose) from which the oil was discharged. Consequently, no question is presented as to whether the company was a person upon whom civil penalty liability is imposed under 33 U.S.C. 1321(b)(6).

In cases such as this one, where an issue is presented to the hearing officer as to which of more than one allegedly liable parties should be subject to a penalty under 33 U.S.C. 1321(b)(6), it is appropriate for that hearing officer to carefully consider all evidence presented to him bearing on the issue in reaching his determination on that issue. The record in this case amply shows that the hearing officer undertook such a consideration. Therefore, unless it can be shown that the results of this consideration were not based on the evidence before him or led to an improper application of the statute, his determination to assess the penalty against the company cannot be found to be arbitrary or capricious.

I note that [the other company's agent's] role in the transfer operation is the subject of conflicting evidence.

There is indeed some question as to whether he was the operator of the facility at the time of the discharge and therefore also liable under 33 U.S.C. 1321(b)(6). However, for the purposes of this appeal I need not address that question. The sole question presented here is whether the hearing officer acted in an arbitrary and capricious manner in assessing the penalty against the company.

As you indicate in your appeal the purposes of the controlling statute cannot be ignored in reaching a decision under it. You also correctly note one of the purposes of 33 U.S.C. 1321 as being to minimize the quantity of oil discharged into the waters of the United States. You should also note, as held in Marathon Pipe Line Co. v. U.S., 588 F.2d 1305 (CA7, 1979), and Tex-Tow, Inc. v. U.S., 589 F.2d 1310 (CA7, 1979), that another purpose is to place the financial burden of achieving and maintaining clean water on owners or operators of polluting facilities.

In furtherance of these two purposes, it is appropriate for hearing officers to assess penalties under 33 U.S.C. 1321(b)(6) in a manner which will encourage owners and operators of polluting facilities to take special precautions to prevent oil pollution. Evidence contained in the record of this case clearly supports the hearing officer's decision in this respect. The portion of the facility, the failure of which resulted in the prohibited discharge, was supplied by the company with knowledge of its intended use. The imposition of the penalty against the company in this case will encourage the company, and others similarly situated, to take special care in providing such equipment. Such care might include steps to assure that the equipment is particularly suited for the intended use and to assure that it is used in the proper manner. For these reasons I conclude that the hearing officer's decision to assess the penalty in this case against the company was appropriate, reasonable, and neither arbitrary nor capricious.

Finally, your reliance on U.S. v. Georgetown University, 331 F. Supp. 69 (1971), is misplaced. First, that case involved the violation of a criminal statute; the statute here provides for a civil sanction. Second, the court in Georgetown pointed out clearly at the outset that the "decision is limited to the peculiar facts and circumstances of the instant case," Id. at 69, 70.

Furthermore, the evidence in the present case differs substantially from facts which the court in Georgetown found to be critical. First, the equipment which failed in that case: (1) was subject to inspection, examination, and testing by persons other than the defendant; (2) had been supplied by others; and (3) had not been and would not have been accepted by the defendant. Here, as noted above, the equipment which failed was owned and had been supplied by the company. Second, the person which the court considered to be at fault in that case was an independent contractor of the defendant. Here, except for your unsupported assertions, there is no evidence in the record demonstrating that the other company's agent was under contract with anyone to unload the truck owned by the company. Third, the court in Georgetown found that the defendant's plant-operating personnel had not been fully instructed in the use of the new and unfamiliar equipment. Here, the company employees involved were the dispatcher who authorized the use of the hose which failed and the truck driver who operated the pump on the truck. There is no evidence in the record whatsoever that the dispatcher was unfamiliar with the use of the hose for transfer operations, or that the truck driver was unfamiliar with unloading operations in general or with the operation of the truck's pump in particular . . . .

G-LMI ltr 16460/8 of 26 Aug 1981

FWPCA PENALTY CASE --- DETERMINATION OF PROPER PARTY FOR FAILURE TO POST A POLLUTION PLACARD

Your contention that the company is not liable for the penalty assessed for the violation of 33 CFR 155.440 is without merit. Under 33 U.S.C. 1321(j)(2) the owner or operator of a vessel is liable for violations of regulations promulgated under 33 U.S.C. 1321(j)(1), such as 33 CFR 155.440. Under 33 CFR 155.440 a vessel cannot be operated without the pollution placard described in that regulation posted in certain areas on board. The Report of Boarding states that the required placard was not onboard the vessel. You have not denied this allegation. I find there is substantial evidence in the record which supports the hearing officer's finding of a violation of 33 CFR 155.440 in that the subject vessel did not have the required pollution placard. The fact that the "captain" of the vessel might not have been an employee of the company is not a defense against civil penalty liability under 33 U.S.C. 1321(j)(2). As stated above, the owner or operator of a vessel is subject to a civil penalty assessment when that vessel is operated in violation of 33 CFR 155.440. The company is an owner or operator within the meaning of that term as used in 33 U.S.C. 1321. See 33 U.S.C. 1321(a)(6) and (7). You have not presented any evidence which shows that another party was the owner of the vessel, or that the hearing officer erred in assessing the penalty against the owner rather than the operator. Therefore, I find that the hearing officer properly assessed this penalty against the company as the owner of a vessel which was operated in violation of 33 CFR 155.440.

G-LMI ltr 16731/8 of 27 Aug 1981

EXCERPTS FROM OFFICER BCMR DECISIONS

Docket No. 104-81:

Petitioner had requested the BCMR to raise the marks on ten fitness reports. In evaluating the case the Board made the following general statements:

. . . . .

> "In Application, Docket No. 91-77, we determined that a reporting officer who strictly adhered to the experienced distribution of marks shown on the fitness report form severely prejudiced the chances for promotion of the officer being evaluated. In that case, and in subsequent cases, we determined that when the evidence persuasively demonstrated that the reporting officer strictly adhered to the experienced distribution and that, as a result, the marks assigned do not reflect his actual evaluation of the officer reported on, the marks should be upgraded. In those cases, we changed the petitioner's marks to those which, according to the actual distribution of marks, would place the petitioner in the percentage ranking in which the reporting officer intended to rate him. Application, Docket Nos. 75-80, 36-80, 97-79.
>
> In Application, Docket No. 91-77, we also stated that there is a substantial burden on the petitioner to show that (1) the marks he received were not reasonably close to those of his fellow officers, and did not reasonably reflect his performance, (2) the report as a whole does not contain such language which would qualify the marks in such a manner as to enable the selection board to evaluate fairly the officer in relationship to his fellow officers, and (3) it is reasonable to believe that the report prejudiced the officer's opportunity to be selected for promotion. Thus, we denied relief despite the reporting officer's statement, where other factors such as the marks in Sections 15 and 16 and the comments in Section 18 of the report provided a fair basis upon which the selection board could consider the petitioner for promotion.
>
> The fitness report form contains no experienced distribution of marks for Sections 15 (attitude) and 16 (comparison). In the past, we have held that the experienced distribution of marks does not apply to these sections and, therefore, reporting officers could not have been misled by the form in assigning marks in those sections. See, Application, Docket Nos. 59-78 and 75-80. In those cases, we determined that the mere fact that an inflation of marks has taken place is an insufficient basis for a grant of relief with respect to

> those sections. Accordingly, our discussion of the alleged error or injustice in connection with the experienced distribution of marks in this case will be limited to Sections 14 and 17 of the fitness reports."

. . . . .

The Board proceeded to the particular fitness reports in question. With respect to two of the reports it concluded the following:

. . . . .

> "We believe that the reporting officer's statement is inadequate on its face to demonstrate material error or injustice. We note particularly the last paragraph of the reporting officer's statement. There, the reporting officer states that he did not mark petitioner too low, but rather fairly and reasonably: His statement indicates that the reason he is making this statement is not that he believes that an error or injustice has been committed with regard to the marks he assigned, but rather because he believes this is the only way he can ensure petitioner's continued employment in the Coast Guard.
>
> The reporting officer interprets petitioner's failure of selection as an indictment of the entire evaluation system and seems to be willing to make whatever statement is necessary to ensure petitioner's future employment in the Coast Guard. The reporting officer apparently views this Board as part of the Coast Guard promotion "system" and believes he must "prostitute" his principles in order to attain a result which he considers correct. We decline to grant relief on the basis of such a statement by a reporting officer. We believe that the reporting officer misperceives his role and that of the Board. According to COMDTINST 1611.7 (September 13, 1978), it is not the responsibility of the reporting officer to determine whether an officer should be promoted or passed over. The reporting officer's job is to evaluate the performance and personal qualities of his subordinates, and it is the job of promotion boards to determine who shall be promoted by comparing each officer with his/her peers on the basis of his/her total record, which includes a number of factors in addition to fitness report scores.
>
> The purposes of the Board's inquiry herein is to ascertain whether the marks in the challenged reports are inaccurate or unfair. Our purpose is not to determine whether petitioner is deserving of promotion and solely on that basis to make whatever changes will ensure his promotion. We do not believe that the reporting officer's statement demonstrates that he strictly adhered

> to the experienced distribution and that, as a result, the marks assigned do not fairly and accurately reflect his evaluation of petitioner. Therefore, we decline to grant the relief requested."

. . . . .

Relief was also denied on the next four reports:

. . . . .

> "Our conclusion that the reporting officer was not misled by the experienced distribution is further supported by a comparison of the reporting officer's marking history to his statement. For example, according to the reporting officer's statement, by assigning petitioner a mark of 7 in Section 14g (overall performance) in the first report he submitted, he intended to place petitioner in the 50th percentile. However, according to the reporting officer's marking history, as presented by the Chief Counsel, above, a mark of 7 placed petitioner in only the 38th percentile in comparison with all lieutenants being evaluated by this reporting officer.
>
> Thus, it appears that the reporting officer is saying that although petitioner was in the bottom 38% of the lieutenants assigned to his command, petitioner should be at the median of all lieutenants in the Coast Guard. We can only speculate as to how such a result could occur. As discussed earlier, one could argue that the lieutenants assigned to this reporting officer's command were more competent that those assigned elsewhere in the Coast Guard. While the reporting officer may sincerely believe this to be the case, we do not agree. Rather the evidence convinces us that the reporting officer was not misled by the experienced distribution, to the prejudice of petitioner, but rather that, he, along with the majority of reporting officers, was inflating fitness report marks. Thus, the evidence demonstrates that the reporting officer did not strictly adhere to the experienced distribution, but rather that he was "guided by" it and formulated his own standards for assigning marks to the lieutenants he evaluated. That standard did not deviate so much from the standard applied by other reporting officers as to result in inaccurate or unfair fitness reports for petitioner. For these reasons, we decline to direct that the marks in these reports be upgraded.
>
> The evidence concerning the reporting officer's marking history, which was submitted by the Chief Counsel, raised an issue which has not previously been addressed by this Board. We wish to emphasize that our decision

> herein does not represent a reversal of our established policy of granting relief where the petitioner cannot convincingly demonstrate that the reporting officer was misled by the experienced distribution, he/she assigned marks which do not accurately and fairly reflect his/her evaluation of the petitioner's performance. However, when, as in the present case, the evidence before the Board persuasively rebuts the reporting officer's statement that he marks lower than other reporting officers, we will deny relief."

. . . . .

The next challenged fitness report was evaluated in a similar manner:

. . . . .

> "In the present case, the challenged fitness report was submitted on August 4, 1978 -- well after the publication of the letter of the Chief, Office of Personnel, on March 24, 1978. Thus, it is clear from the record that the reporting officer was or should have been aware of the existence and the extent of the inflation of mark and that he knew or should have known how the marks he assigned to petitioner would compare against the marks being assigned by other reporting officers to other lieutenants. Therefore, we are not persuaded that the reporting officer was so misled by the experienced distribution that he assigned the challenged marks without a fair understanding of the significance of those marks. In the absence of such convincing evidence that the reporting officer was misled by the experienced distribution of marks published by the Coast Guard, we find no basis upon which to grant relief."

. . . . .

Relief was likewise denied with respect to the final three fitness reports:

. . . . .

> "We have dealt with the subject of the desired distribution of marks and the problem of inflation of marks at length in Application, Docket Nos. 111-80, 75-80, 61-80, 51-80, and 36-80. In those cases, we declined to find that the entire fitness report system is unjust as a result of the Coast Guard's use of the desired distribu-of marks. We recognized that there was an inflation of marks, but we declined to find that upgrading the marks of the petitioners was an appropriate remedy for the widespread inflation. In Application, Docket Nos. 51-80 and 36-80, we determined that the statement of the

reporting officer merely reiterated the statement in Section 19 of the fitness report that the reporting officer marked in accordance with the desired distribution, and it provided no convincing evidence of error or injustice in connection with the marks.

In Application, Docket No. 51-80, we stated that the desired distribution serves as a guide for the assigning of marks, but not a precise formula. We stated:

> Since petitioner's reporting officer was evaluating only a small number of the total group of commanders in the Coast Guard, his ranking of petitioner is necessarily an approximation. We do not find it to be prejudicial error that the Study Group Report indicates that, ultimately, petitioner was not placed in precisely the percentile suggested by the desired distribution. Moreover, we believe that the Chief Counsel's arguments with respect to the consequences of granting applications such as petitioner's are well taken.

We find no significant distinction between the present case dealing with this issue. Accordingly, we decline to grant the relief requested."

. . . . .

Docket No. 153-80:

Petitioner had requested the removal of certain comments from several fitness reports. In disposing of the case the Board made the following findings:

. . . . .

"We agree with petitioner that the remarks in question refer to a minor deficiency about which he was not counselled. If this error were prejudicial, the appropriate remedy would be to treat the report as adverse and allow the officer to submit comments. In this case, we do not find that the error is prejudicial.
Article 14-A-4 provides that only the last seven years of an officer's service are considered significant for purposes of the captain selection board. Therefore, we are not persuaded that petitioner was prejudiced before the 1979 captain selection board, and we will not direct at this late date that petitioner be allowed to submit comments to the report for September 2, 1971, to January 31, 1972. Because we have found that the error was harmless, and we have refused to direct that the remarks be removed, we also decline to direct that the comments in the two later reports, be removed. These two are

> complimentary but refer to petitioner's earlier shortcomings concerning his relationships with subordinates."

. . . . .

> These next two fitness reports contain reference to petitioner's aircraft accident. The comments merely refer to the fact that petitioner had been injured in the accident and was on limited duty for a time. Petitioner and the Chief Counsel present somewhat conflicting views as to whether petitioner was at fault in the accident. However, since we do not believe that the comments indicate any blame on the part of petitioner for the accident, we do not need to pursue this issue. The record amply demonstrates the accuracy of the reporting officer's statement that petitioner was in an aircraft accident. We do not believe that the reporting officer should be required to set forth all of the circumstances of the accident. Therefore, we find no error or injustice in connection with these comments."

. . . . .

> This next report states, 'Except for one occasion, where the disciplinary and administrative processing of recruit offenses became confused because of communications problems, (petitioner) has handled this aspect of his job in an excellent fashion.' The comment is not very specific, and we are unwilling to conclude that it refers only to the non-judicial punishment proceeding, which petitioner was not involved in, and not to any subsequent involvement by petitioner in the punishment of the recruits. Therefore, we are unwilling to find that the comment is inaccurate or based upon a misapprehension of petitioner's involvement in the incident. Accordingly, we find no manifest error or injustice in connection with this report."

. . . . .

Docket No. 152-80:

In this case petitioner challenged several reports written by two different reporting officers. He also complained of documentation missing from his files. With respect to the reports submitted by one of his reporting officers the Board found the following:

. . . . .

> In his position paper, the Chief Counsel contends that petitioner has failed to meet the burden of proving that the reporting officer was misled by the experienced

distribution of marks and that the marks assigned do not reflect the reporting officer's intent. Application, Docket Nos. 97-79, 68-79, 91-77. We agree. The reporting officer's letter of January 12, 1981, provides no evidence that the reporting officer relief upon the experienced distribution in assigning petitioner's marks and that, as a result, the marks petitioner received were low than the marks the reporting officer would have assigned, had he been aware of the "actual" distribution of marks which has since been made public. Therefore, we find no evidence of error or injustice in connection with the marks petitioner received in these three reports.

Petitioner also alleges that the reporting officer was biased against him, as evidenced by the fact that, contrary to Article 7-4-5, Coast Guard Regulations, petitioner was assigned the collateral duty of mess treasurer for three months, instead of the two month maximum term set forth in the regulations. Petitioner also contends that bias is shown by the fact that although his marks increased over the period covered by the three reports, the reporting officer's attitude toward having petitioner under his command (Section 15 of the reports) remained constant.

The Chief Counsel contends that petitioner's evidence fails to show personal bias or prejudice on the part of the reporting officer directed towards him and argues that the marks in the attitude section are not inconsistent with the other sections of the fitness reports. We find that petitioner's allegations of bias are unsupported by any evidence in the record. We are not persuaded that the assigment of error of petitioner to the minor collateral duty of mess treasurer for one month longer than normal is evidence of a personal bias on the part of the reporting officer which would taint his evaluation of petitioner's performance. We also find no manifest inconsistency in the fact that while petitioner's performance improved over the period of the three reports, (which was to be expected as he gained experience), the reporting officer was merely "pleased" to have petitioner under his command.

Petitioner's final contention respecting these three reports is that the marks contained in the reports render them unsatisfactory and that, therefore, the reports should have been referred to him for comment, in accordance with Article 10-A-12(e), Coast Guard Personnel Manual. In the past, this Board has declined to find that marks which are low in comparison with those received by the officer's peers, according to the actual distribution of marks, are per se unsatisfactory.

> Application, Docket Nos. 63-80 and 36-80. For these reasons, we will deny petitioner's request for removal of these fitness reports.

. . . . . .

With respect to omitted documentation the Board stated:

. . . . . .

> We will not impose a requirement upon the Coast Guard to include documents in a record before the selection board unless Coast Guard regulations so require. This is true even though petitioner's command may have made a notation on a document that a copy of it was sent to Headquarters for inclusion in petitioner's service record. If regulations do not provide for the inclusion of such documents, we do not believe that the Coast Guard is bound by such a notation by petitioner's commanding officer. Therefore, we will limit our consideration to the inclusion of those documents for which there is some alleged authority in the regulations, namely, Documents a, m, and f, above.
>
> With respect to the Expert Pistol Shot Medal (Document a, above), the Chief Counsel concedes that an error was made in not placing the document in petitioner's file.
>
> However, the Chief Counsel contends that petitioner was not prejudiced by this omission. He notes that petitioner's fitness reports contain a number of references to his small arms training and points out that petitioner's Student Evaluation Sheet, which was in his file, attests to his marksmanship abilities and eligibility for the award. The Chief Counsel also argues that the marksmanship award recognizes ability, rather than past heroism or exceptional service and is, therefore, not an indicator of performance, which, pursuant to Article 14-A-3, is the significant factor for promotion. Because petitioner's record contains other indications of his qualification for the marksmanship award, we agree with the Chief Counsel that the error was harmless.
>
> With respect to the Cutterman Insignia (Document m, above), the Chief Counsel contends, and we agree, that it is not an award but rather a qualification based upon completion of six months continuous satisfactory service aboard a cutter. Moreover, the fact that petitioner satisfactorily completed a seagoing tour of duty is clearly indicated in his fitness reports. Therefore, we find no error in connection with this document.
>
> With respect to the letter authorizing access to the armory (Document f, above), we agree with the Chief

> Counsel that a letter providing the requisite authority to undertake assigned duties, which are fully evaluated in petitioner's fitness reports, adds nothing to the information already available to the selection board. The purpose of the letter is the safekeeping and accounting of weapons and ammunition, not an indication of petitioner's performance. Therefore, the error is harmless with regard to petitioner's opportunities for promotion.

. . . . .

Docket No. 139-80:

Petitioner requested in this case, the removal of several comments from his fitness reports and the upgrading of marks. In evaluating his arguments the Board made the following observations:

. . . . .

> In the past, we have decided that late preparation of a fitness report is, by itself, harmless error, and we have required that the petitioner show that he has been prejudiced by the delay. Application, Docket Nos. 112-77 and 68-79. We have declined to find that a report submitted late is inherently unreliable, and we have refused to reduce the quality of information indicator on the basis of the lateness of the report. Application, Docket No. 61-80. Petitioner has failed to demonstrate any prejudice resulting from the late submission of this report. Therefore, we decline to grant the relief requested.

. . . . .

> In cases such as petitioner's, we have stated that the experienced distribution of marks has been shown by COMDTINST 1611.7, dated September 13, 1978, to have been grossly misleading. COMDTINST 1611.7 provides that a statistical breakdown comparing the experienced distribution of marks printed on the fitness report forms to the "actual" distribution of marks assigned to officers during the period of February 1977 to February 1978. The statistical breakdown shows that there has been a substantial inflation of marks since the experienced distribution was published. (A memorandum from the Chief, Office of Personnel, dated August 7, 1978, shows that this inflation of marks also existed from 1973 to 1977). In Application, Docket No. 91-77, we determined that a reporting officer who strictly adhered to the experienced distribution of marks shown on the fitness report form severely prejudiced the chances for promotion of the officer being evaluated.

> In the present case, petitioner has submitted the affidavits of his reporting officers. In their affidavits, the reporting officers state that they were influenced by the experienced distribution of marks in evaluating petitioner and that the marks assigned to petitioner placed him lower in his peer group than the reporting officers intended. For example, a mark of 7 for overall performance of duties should have placed petitioner in the upper 36-65% of his peers. According to the actual distribution of marks, however, a 7 placed petitioner in the lower 3-23%. Therefore, we find that the reporting officers for the three reports in question were misled by the experienced distribution of marks and that, as result, the reports do not accurately and fairly represent their evaluations of petitioner. We find that this constitutes error and injustice, and we will direct that petitioner's marks be upgraded to reflect the intent of the reporting officers.
>
> . . . . .
>
> Furthermore, we do not believe that the evaluation called for by Section 15 of the fitness report form is per se improper. We agree with the Chief Counsel that any rating system done by an officer's superior officer will involve some element of subjectivity. We are not willing to say that the evaluation in Section 15 is so subjective as to be unfair to the officer reported on, nor do we believe that upgrading selected marks would be an appropriate antidote to the subjectivity of the evaluation. For these reasons, we will deny petitioner's request that the "attitude" marks in these two reports be upgraded.
>
> . . . . .

In his memorandum in support of his application, petitioner requested that the Board fix a 30-day deadline for the Coast Guard to file its position paper in this matter. The Chairman of the Board had denied similar requests in Application, Docket Nos. 61-80 and 78-80. Furthermore, on October 9, 1979, the General Counsel denied a similar request, pointing out that the current policy of the Board is to decide cases without position papers whenever it is determined that the Coast Guard has had more than a reasonable time in which to submit its views. Therefore, we decline to hold the Coast Guard to a 30-day deadline for the submission of position papers.

Petitioner also requested that a copy of the recommended decision of the Board be provided to his counsel at the time it is submitted to the General Counsel and that his counsel be allowed 30 days in which to submit to the General Counsel such exceptions and a legal memorandum as may be appropriate. In Application, Docket Nos. 38-79, 42-79 and 97-79, we denied such requests. In

Application, Docket No. 97-79, we determined that the Board's regulations did not provide for such a procedure, nor is such a procedure required by Koniag Inc. v. Andrus, 580 F.2d 601 (D.C. Cir.), cert. denied 99 S.Ct. 733 (1978), which is cited by petitioner. We believe that our decision in these cases was correct, and we will deny petitioner's request.

. . . . .

Docket No. 111-80:

Petitioner challenged two fitness reports prepared on the raw "desired distribution" form. In denying all relief the Board stated:

. . . . .

> In each of our prior cases involving the desired distribution of marks, Application, Docket Nos. 61-80, 78-80 and 36-80, we refused to upgrade the petitioner's marks. In those decisions, we refused to find that the entire Coast Guard fitness report system was inherently unjust or that it was "bankrupt", morally or otherwise. We stated that the mere existence of an inflation of marks did not automatically result in an error or injustice in the individual petitioner's record, but rather, we held the petitioner to the substantial burden of proving that he had suffered some peculiar harm as a result of the inflation of marks.
>
> The revised fitness report form, containing the desired distribution of marks, includes a statement which each reporting officer is required to sign, verifying that he or she has marked according to the desired distribution. The affidavit of petitioner's reporting officer merely reiterates this certification and does not provide a basis for relief. It is apparent from his affidavit that the reporting officer feels that he is responsible in some part for petitioner's failure of selection for promotion to captain. This, the reporting officer believes, is because he conscientiously followed the desired distribution in assigning petitioner's marks. However, it is not the responsibility of a reporting officer to assign marks according to what he believes is necessary to ensure the officer's promotion. The selection board process is inherently competitive, and selection board decisions are based upon a consideration of a number of factors concerning an officer. Therefore, the mere fact that petitioner failed of selection does not demonstrate that the marks in question are inaccurate or unfair. Moreover, given the fact that all reporting officers were required to certify that they marked in accordance with the desired distribution, we cannot agree that petitioner's failure of selection demonstrates

> that he was "misrepresented" before the selection board in some unique way, due to the marks assigned by this reporting officer.
>
> Furthermore, we believe that the desired distribution of marks serves as a guide, for the assigning of marks, but not a precise formula.
>
> Since petitioner's reporting officer was evaluating only a small number of the total group of commanders in the Coast Guard, his ranking of petitioner is necessarily an approximation. We do not find it to be correctible error that the Study Group Report indicates that, ultimately, petitioner was not placed in precisely the percentile suggested by the desired distribution. Moreover, we believe that the Chief Counsel's arguments with respect to the consequences of granting applications such as petitioner's are well taken. For these reasons, we will deny petitioner's application.
>
> We will also deny petitioner's request for insertion of the reporting officer's affidavit into his fitness report file. Article 10-A-4, Coast Guard Personnel Manual, does not permit the inclusion of such material in a fitness report file. Furthermore, we find no error or injustice which would justify such a correction of petitioner's record.

. . . . .

Docket No. 11-80:

Petitioner requested correction of his records to show that he was retired by reason of physical disability instead of by reason of voluntary retirement after twenty years of service. The Board's evaluation follows:

. . . . .

> We believe that there is a major flaw in petitioner's request for relief from this Board. Although we are empowered to grant relief based upon equity and justice, in the absence of error or injustice we will not substitute our own judgment for that of the Coast Guard. Considering the facts before us we must agree with the statement in the position paper submitted by the Chief Counsel of the Coast Guard that petitioner failed to exhaust the administrative remedies available to him. The Coast Guard in Article 17 of the Personnel Manual provides comprehensive procedures for reviewing disability retirement and severance pay claims. The various procedures enunciated in Article 17 for review boards afford Coast Guard members significant safeguards and protections in this complex area. The fact that

petitioner did not choose to complete the necessary administrative steps and procedures is puzzling. From his application it is apparent that the petitioner, although disagreeing with the conclusion and findings made by the PRC chose not to contest them. He consciously decided not to submit a rebuttal and proceed with his case to the last and final level of review, the PDAB. Petitioner states that he saw proceeding to the PDAB, a "futile gesture" and one which was to the economic detriment of the Coast Guard as petitioner was on Home Awaiting Orders status at the time. Petitioner further relied on the outcome of the case of a Coast Guard Captain which allegedly presented similar issues whose appeal was rejected by the PDAB. We do not find petitioner's analysis to be persuasive. These are insufficient reasons for his not exhausting the internal administrative remedies provided by the Coast Guard. Under the circumstances, petitioner had one acceptable and explicit course to follow. Having reached the level of the PRC, Article 17-F-3(b)(2) of the Coast Guard Personnel Manual provides for a rebuttal by a member who is unable to concur in the substituted recommended findings of the PRC at which time the PRC could modify the substitute findings or adhere to the substitute recommended findings. If the PRC adheres to the substitute recommended findings, a member then has the administrative remedy of another review of the recommended substitute findings of the PRC by the PDAB.

Petitioner has stated several reasons to support his non-compliance with Coast Guard Regulations. However, we have not been persuaded by the arguments advanced by petitioner. The petitioner chose not to contest the decision of the PRC and under the circumstances, we will not substitute our judgment for that of the Coast Guard. Petitioner willingly and knowingly accepted the Coast Guard's finding that he had no ratable disability therefore we will not act to countermand the Coast Guard's decision.

EXCERPTS FROM ENLISTED BCMR DECISIONS

Docket No. 122-81:

Petitioner requested the BCMR to correct her record by voiding her request to extend her enlistment and by allowing her to reenlist for a six-year term, thereby qualifying for a Selective Reenlistment Bonus based upon a full six years. The Board found as follows:

. . . . .

Paragraph 1(g) of COMDTINST 7220.13E (May 4, 1979) and Article 12-B-4, Coast Guard Personnel Manual, require

> that each potential reenlistee who would be eligible for an SRB be informed of his or her eligibility and of the amount of SRB for which he or she is eligible. We are persuaded by the record in this case that petitioner was misadvised as to her eligibility for early reenlistment and for a full SRB. Therefore, we find that the Coast Guard failed to comply with the provisions of COMDTINST 7220.13E and Article 12-B-4. In Application, Docket Nos. 100-80 and 157-80, we found similar errors and granted relief. In the present case, petitioner states that she would have declined the transfer to the Eighth District had she been informed that by agreeing to the extension agreement, which she believed was required, she would forfeit her eligibility for a portion of her SRB.
>
> Had petitioner been correctly advised, she could have reenlisted on August 7, 1980, and qualified for an SRB. However, the remainder of her then-existing enlistment contract would have been subtracted from her additional obligated sevice for bonus computation purposes. We note that petitioner also had the option of extending her enlistment for three to six years, thereby qualifying for an SRB. Since the extension would not become effective until the expiration of her current enlistment contract, she would have no time deducted for bonus purposes. Such an extension was clearly authorized by the Commandant's message of May 29, 1980; however, petitioner was not properly informed regarding this option.
>
> In her application, petitioner states her desire for an SRB based upon a full six years of additional obligated sevice. Therefore, we believe that the error in this case can best be remedied by correcting petitioner's record to show that on August 7, 1980, she extended her enlistment for six years, rather than 30 months. Thus, petitioner will qualify for a full SRB.

Docket Nos. 4-81, 148-80, and 137-80:

In each of these three cases the petitioner requested that his enlistment code by changed from RE-4 (not recommended for reenlistment) to RE-1 (recommended for reenlistment). In 4-81 the Board stated:

. . . . .

> Article 12-B-4(b), Coast Guard Personnel Manual, requires that a service member be given a reenlistment interview approximately six months prior to the expiration of his/her enlistment and advised as to whether or not he/she is recommended for reenlistment. A service member who is not recommended for reenlistment is to be informed of the reasons therefor. The purpose of this

> interview is to afford the member notice of the decision not to recommend him or her for reenlistment and an opportunity to improve his/her record sufficiently to earn a favorable recommendation for reenlistment. Contrary to the requirements of Article 12-B-4, petitioner's reenlistment interview was conducted only 32 days before his discharge. Therefore, we find that the Coast Guard committed prejudicial error by failing to conduct petitioner's reenlistment interview in accordance with the time requirement stated in Article 12-B-4(b), Coast Guard Personnel Manual. The 32-day period between petitioner's predischarge interview and the expiration of his enlistment did not provide an adequate opportunity for petitioner to show improvement in his performance.
>
> In addition, we find that the Coast Guard committed a second error by failing to advise petitioner, when he was notified that he was not recommended for reenlistment, of his right to submit a written appeal of this determination to the Commandant within fifteen days of that notification. Article 12-B-5, Coast Guard Personnel Manual.
>
> In order to correct these two errors on the part of the Coast Guard, we will direct that petitioner's record be changed to show that he was recommended for reenlistment.

. . . . . .

In 148-80 the Board found:

. . . . . .

> Article 12-B-16, Coast Guard Personnel Manual, provides that a member may be discharged by reason of unsuitability due to inaptitude, a category which is applicable to those persons "who are best described as inapt due to lack of general adaptability, want or readiness of skill, unhandiness, or inability to learn." Our review of petitioner's military record reveals no evidence to support a finding that he was inapt due to lack of adaptability, want or readiness of skill, unhandiness or inability to learn. There is no indication in the record that petitioner failed any progress tests or inspections or that he was otherwise unable to perform the requirements of recruit training. Therefore, we find that the Coast Guard's decision to discharge petitioner by reason of unsuitability due to inaptitude was error.
>
> Moreover, Article 12-B-16(d) requires that the member be informed in writing of the specific reason he is being

> considered for discharge and afforded an opportunity to submit a statement in rebuttal. Petitioner was informed in writing that he was being discharged because a medical board had found him unsuitable, and he was told by the social worker that he was being discharged because of immaturity. Petitioner was never informed that he was being discharged because of inaptitude, and he was never afforded an opportunity to submit a statement in rebuttal to the finding that he was inapt. Therefore, we find that the Coast Guard failed to properly inform petitioner of the specific reason for his discharge, as required by Article 12-B-16.
>
> The evidence in petitioner's record might support a discharge by reason of unsuitability due to a personality disorder. However, the Coast Guard chose not to discharge petitioner on that basis. Since the Coast Guard did not see fit to base petitioner's discharge on a personality disorder, we do not believe that this Board should do so. Rather, we believe that the errors in petitioner's record, discussed above, can best be remedied by changing the reason for petitioner's discharge to that of the convenience of the Government. Article 12-B-12, Code OND (convenience of the Government).
>
> Since petitioner's record will no longer show that he was discharged by reason of unsuitability, we find that his reenlistment code should be changed to RE-1.

. . . . .

In 137-80 the Board made the following findings.

. . . . .

> Article 12-B-16(d)(1) required that petitioner be informed in writing of the reasons that he was being considered for discharge, specifically one or more of the reasons listed in Article 12-B-16(b). Petitioner's record shows that he was never informed of the reasons for which he was being considered for an administrative discharge. Moreover, petitioner's record is devoid of any evidence to indicate that petitioner was afford the opportunity to submit a statement in writing in his own behalf as mandated by Article 12-B-16(d)(2). In light of these facts, we find that the Coast Guard erred by failing to inform petitioner of the reasons for his discharge prior to his discharge and by failing to give petitioner the opportunity to submit a statement in his own behalf.
>
> Additionally, Article 12-B-16(c)(2) states that an individual will normally be issued an honorable discharge

under the authority of this paragraph. However, the issuance of a general discharge is warranted where there is misbehavior, bad faith or failure to make a proportionate effort having due regard of his/her rate and capabilities. Moreover, the basis upon which a general discharge is awarded shall be summarized on page 7 of the service record, and such entry should reflect a record of disciplinary infractions in training, culpable failure to conform to minimum standards for recruit or reserve training or poor attitude. We have not found in petitioner's record any evidence which would support the issuance of a general discharge to petitioner. Although petitioner was given a 2.90 mark in conduct there is no information in the record with regard to the basis for this low mark. Moreover, Article 10-B-4(b)(2)e states: "Whenever a mark below 4.0 is assigned in Conduct, and the service record contains no entries during the marking period to substantiate such a mark, a page 7 entry of explanation must be made." Petitioner's record, including page 7, is devoid of any explanations for petitioner's low mark.

In light of our discussion above, it is clear to us that the Coast Guard failed to follow its regulations in effecting petitioner's discharge. For the reasons stated above, we will correct petitioner's record to show that he received an honorable discharge by reason of the convenience of the Government, with the separation code, OND. We will also change his reenlistment code to RE-1, since we have not found that petitioner's record supports the assignment of an RE-4 reenlistment code.

. . . . .

. B. HELSEL
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